THE INDIAN LAW REPORTS,

BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

2086
345/30

Names of Reporters.

PRIVY COUNCIL.

C. Boulnois, Middle Temple.

HIGH COURT.

H. C. Kirkpatrick, Lincoln's Inn.

Ganpat Sadáshiv Ráv. } Assistants.
Gangárám Bápsoba Rele. }

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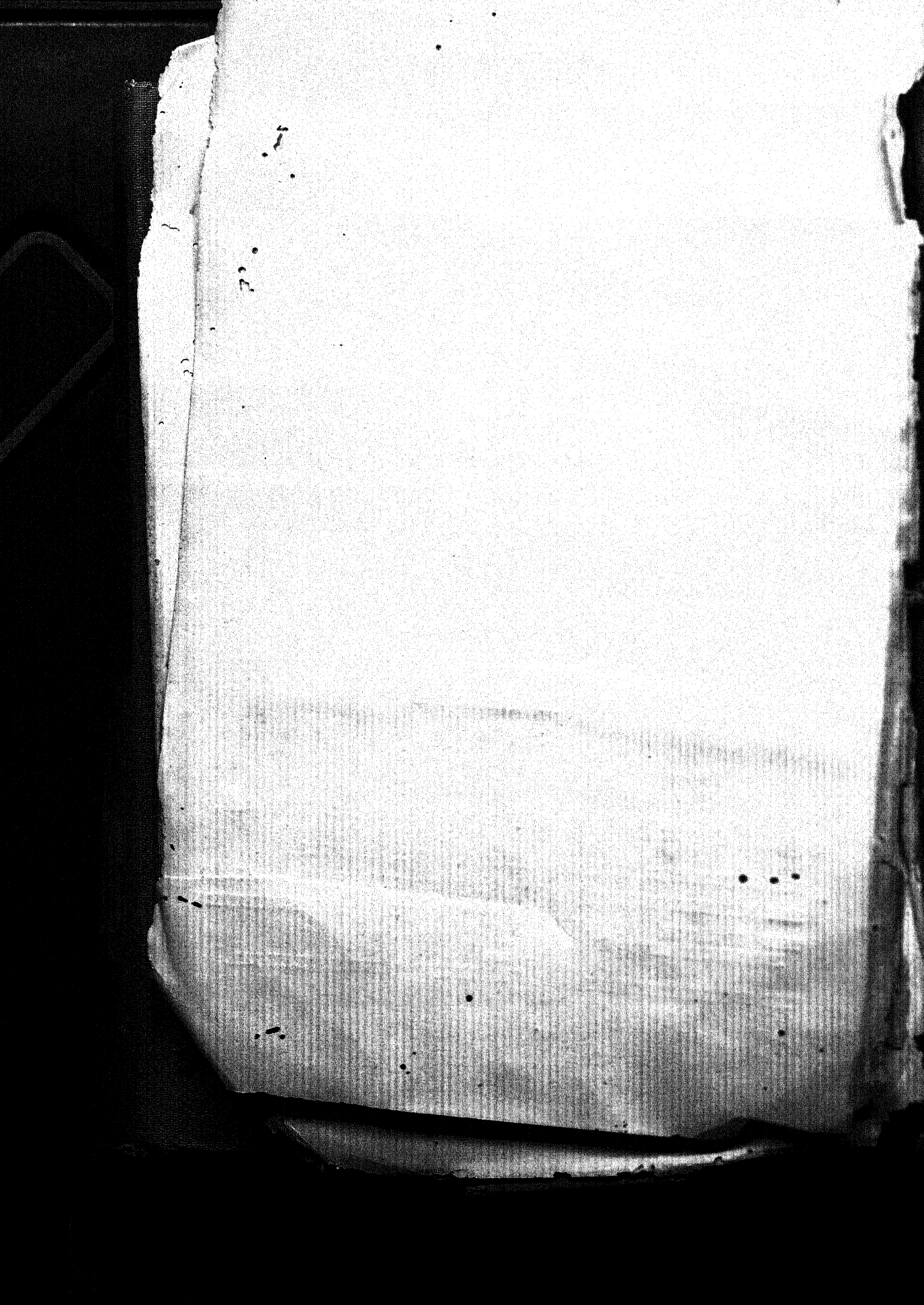
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JUDGES OF THE HIGH COURT.

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" H. J. Parsons (*Acting from 18th February 1899 to 22nd April 1899*).

Sir Lawrence Jenkins, *Knight* (*Appointed on 22nd April 1899*).

Puisne Judges.

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" E. T. Candy.

" M. G. Ranade.

" B. Tyabji.

" E. M. H. Fulton (*On furlough for one year from 25th March 1899*).

" L. P. Russell.

" M. H. Starling (*Acting from 27th February 1899 to 22nd April 1899*).

" W. H. Crowe (*Acting from 25th March 1899*).

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" B. Scott (*Acting Advocate General*).

" H. Batty (*Legal Remembrancer*).

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T. D. Fry (*Acting*).



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THE

INDIAN LAW REPORTS,

Bombay Series.

ORIGINAL CIVIL.

Before Mr. Justice B. Tyabji.

NATHA KERRA, PLAINTIFF, *v.* DHUNBAIJI AND OTHERS, DEFENDANTS.*

1898.
July 23, 25, 28.

Will—Construction—Bequest to wife with obligation of maintaining and educating children—Interest taken under such bequest—Decree against wife—Attachment of interest under will—Civil Procedure Code (Act XIV of 1882), *Sec.* 274—*Fraudulent conveyance—Transfer of Property Act (IV of* 1882), *Sec.* 53.

Bomanji Darasha Captain died in 1891 leaving a widow Dhunbaiji (defendant No. 1) and two sons, Perozsha and Darasha (defendants Nos. 4 and 5). By his will he bequeathed the residue of his property to trustees (of whom Dhunbaiji was one) in trust to pay the rents and income thereof to his wife Dhunbaiji for life, "she thereout maintaining, educating and bringing up" his children in a manner suitable to their degree in life. After his death the property, moveable and immoveable, was to be divided among his sons equally when Darasha should attain the age of twenty-five. He attained majority in October, 1895. At the date of suit, Darasha was eighteen years old and Perozsha was twenty-five. It was contended that Dhunbaiji was only a trustee of the rents for the benefit of her sons Perozsha and Darasha.

Held, that under the will Dhunbaiji took a life-interest in the rents subject to the obligation of maintaining, educating and bringing up the children. The only two surviving children (Perozsha and Darasha) having attained majority and having received property under the will of an uncle were now no longer in need of being maintained by Dhunbaiji. The obligation imposed upon her, therefore, by her husband's will was discharged, and she was now entitled to a life interest free from all further obligation to maintain his children.

On the 13th June, 1895, the plaintiffs obtained a decree for Rs. 3,976-10-10 against Dhunbaiji and her son Perozsha. In execution of that decree they attached under an order dated 2nd July, 1897, the immoveable properties which had belonged to the testator's estate, on the ground that both Dhunbaiji and

* Suit, No. 509 of 1893.

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Perozsha had an interest in them. The attachment was issued under section 274 of the Civil Procedure Code (Act XIV of 1882). The defendants contended that Dhunbaiji had no attachable interest at all in the said properties, she being under the will merely a trustee as above mentioned for her sons, and that, if she had, it was a contingent immovable property, which should have been attached under section 268 of the Code, and that the attachment under section 274 was irregular and inoperative. They further alleged that by an assignment dated the 28th February, 1896, Dhunbaiji had assigned and surrendered her interest, such as it was, in Darasha, and that such interest was, therefore, not available to satisfy the plaintiffs' decree against her. As to Perozsha's interest, they further alleged that by a deed of settlement dated the 9th February 1895 it was wholly settled for the benefit of himself and his family and that, therefore, he had no interest in him which could be attached under the order of the 2nd July, 1895.

Held, (1) that Dhunbaiji had an attachable interest in the property.

(2) That her interest was an interest in immoveable property and was validly attached under section 274 of the Civil Procedure Code.

(3) That her assignment of the 28th February, 1896, was invalid as against the plaintiffs under section 276 of the Civil Procedure Code.

(4) That even independently of the attachment, her assignment to her own son Darasha was invalid as against the plaintiffs under section 53 of the Transfer of Property Act (IV of 1882). The object of that assignment was to protect the property from the creditors, and it was designed to defeat the plaintiffs' decree, and it was, therefore, fraudulent and void as against the plaintiffs.

(5) That the deed of settlement by Perozsha of the 9th February, 1895, was void as against the plaintiffs under section 53 of the Transfer of Property Act (IV of 1882).

(6) That the plaintiffs were entitled to realize the shares and interest both of Dhunbaiji and of Perozsha so far as might be necessary to satisfy their decree of 13th June, 1895.

THE plaintiff's firm of Natha Kerra & Co. obtained a decree against the defendant Dhunbaiji and her son Perozsha (defendant No. 4) for Rs. 3,976-10-10 on the 13th June, 1895, in Suit No. 177 of 1895. In execution of that decree they attached certain properties, but on a summons taken out by the defendants that attachment was set aside on the 21st September, 1895, on the ground that Dhunbaiji had no beneficial interest in the properties attached.

The question of Dhunbaiji's interest in the said properties depended on the construction of her deceased husband's will, and

the plaintiff brought this suit (*inter alia*) to have the said will construed and her interest under it ascertained and declared liable to satisfy the decree in Suit No. 177 of 1895.

The plaint stated that Dhunbaiji's husband Bomanji Darasha Captain died in 1891 leaving a considerable amount of property both moveable and immoveable; *inter alia* a half share of certain immoveable properties in Bombay specified in the schedule to the plaint. He left, him surviving, his widow Dhunbaiji (defendant No. 1) two sons Perozsha and Darasha (defendants Nos. 4 and 5) and one daughter since deceased. By his will dated 21st July, 1887, he bequeathed the residue of his property to trustees, *viz.*, Dhunbaiji and one Jivaji Darasha Ghandy (defendant No. 2), upon certain trusts duly set forth therein. The following are the material parts of the will:—

"7. I further direct that my said trustees shall permit my said wife, if she desires, to occupy and enjoy free of any occupation or other rent that portion of my family dwelling-house situate in No. 12, Church Gate Street, Fort, in Bombay in which I at present live, and to use and enjoy the household furniture, effects and things belonging to me therein and during the term of her natural life.

"8. I further direct my said trustees to hold the balance of the property vested in them by this my will after setting apart the sums hereinbefore bequeathed to my said daughters, (but subject to the payment thereout at the proper time or times of the marriage expenses and dower of my daughters and the marriage expenses of my sons, if they or either of them should be unmarried at the date of my death hereinbefore directed), upon trust to pay the rents, profits, interest, dividend and produce of so much thereof as shall from time to time under the provisions of this my will shall remain or be in their hands, unto my wife during the term of her natural life, she thereout maintaining, educating and bringing up my children in a manner suitable to their degree in life.

"9. I further direct that from and immediately after the decease of my said wife then as well as to the immoveable and moveable estate and the capital of the personal estate which may then be or thereafter come into the hands of my said trustees under and subject to the provisions of this my will and as also to the rents, issues, profits, interests, dividends and produce thereof upon trust for such of my sons now born or hereafter to be born to me who either before or after the decease of my said wife shall attain the age of eighteen years to be divided between them equally, on my son Darasha attaining the age of twenty-five years or in the event of his death before attaining the said age at the end of twenty-five years to be completed from the date of his birth, and in case there shall be but one son, then upon trust for such one son.

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"10. And I hereby direct that if any of my sons shall die without having received payment or acquired a vested interest in any such trust estate stocks funds and securities leaving a child or children surviving him or them then and in such case such last mentioned child or children so being a son or sons shall attain the age of eighteen years, or who being a daughter or daughters shall attain that age or marry, shall take and be entitled to such shares of and in my said trust estate moneys, funds and securities and effects and subject to the provision for maintenance and advancement hereinbefore provided by law as his, her or their deceased parent would have been entitled to in case such parent had survived and attained the age of twenty-one years and in the event of all my sons dying without leaving any such child who shall be able to take the share or shares given to their respective father, then and in that event I direct that the property which shall then form the residue of my estate shall be divided among those persons who shall be entitled thereto under the provisions of the Parsi Intestate Succession Act."

Probate of the will was granted to the two trustees Dhunbaiji (defendant No. 1) and Jivaji Darasha (defendant No. 2), and in accordance with the 8th clause of the will they had paid one moiety of the rents of the immoveable property to the first defendant Dhunbaiji.

The plaint further stated that Perozsha (defendant No. 4) was twenty-five years of age and Darasha (defendant No. 5) was eighteen years of age.

By a Judge's order made in the above-mentioned Suit No. 177 of 1895 the plaintiff was appointed receiver, under section 503 of the Civil Procedure Code (Act XIV of 1882), of the attached properties with power to sue for the realization thereof.

The following paragraphs of the plaint set forth the plaintiff's case:—

"12 The said firm contend that upon the true construction of the said will the said Dhunbaiji is entitled to a life-interest in the whole of the rents of one moiety of said properties specified in the said list A and that the said Perozsha has now a vested interest in remainder upon the death of the said Dhunbaiji in one moiety of the said moiety.

"13. The defendants, however, contend that the said Dhunbaiji is under the 8th clause of the said will a bare trustee of the rents of the said moiety for the benefit of her sons the said Perozsha and Darasha, and that she is entitled to apply the whole of the rents handed over to her for the benefit of the said Darasha. The said firm, however, contend that if upon the correct construction of the said will the said Dhunbaiji is a bare trustee as contended by the defendants, the said Perozsha is entitled to a half-share in the said moiety absolutely."

The defendants alleged that by a deed of settlement dated 9th February, 1895, the defendant Perozsha had conveyed all his interest in his father's estate and also in the estate of his uncle to trustees (defendants Nos. 6 and 7) on certain trusts, and that by a deed of assignment dated the 20th February, 1896, Dhunbaiji had released all her life interest in the residuary estate of her husband to her son Darasha (defendant No. 5). The plaintiff contended that these deeds were executed with intent to defeat and delay creditors and were not binding on them.

This suit was filed on the 11th September, 1897. The plaint prayed that the will of Bomanji Darasha Captain should be construed and the rights of the defendant Dhunbai and Perozsha themselves ascertained and declared, (2) that a receiver should be appointed to receive the moiety of the rents and to set apart the share therein of Dhunbai or Perozsha or both, and to pay the same to the plaintiff in satisfaction of the decree in Suit No. 177 of 1895 until the same was fully satisfied; (3) if necessary for administration of the estate of the said testator, and (4) if necessary for a declaration that the deeds of the 9th February, 1895, and of 20th February, 1896, were inoperative against the plaintiffs, &c., &c.

The defendants contended that Dhunbai had herself no beneficial interest under the will, but that she was bound to apply the income paid to her by the trustees towards the maintenance and education of her sons Perozsha and Darasha, and that she had a discretion to apply the larger part towards the maintenance of the younger son Darasha, and that the income was barely sufficient for the purpose. They also set up the two deeds above mentioned.

The main questions raised at the hearing were (1) as to the interests taken by Dhunbaiji and Perozsha under the testator's will; (2) as to the validity of the deeds of 9th February, 1895, and 20th February, 1896, as against the plaintiffs (creditors); (3) as to whether the attachment levied by the plaintiff in September, 1895, was valid.

Rukes (with *Scott*) for plaintiff:—Under the will, Dhunbai took an absolute beneficial interest for life not subject to any

obligation—*Leigh* v. *Leigh*[1]; *Byne* v. *Blackburn*[2]; *Mackett* v. *Mackett*[3]; *Lambe* v. *Eames*[4]; *In re Hamilton*[5]; White and Tudor's Leading Cases (7th Ed.), Vol. II, p. 340. The settlement of 9th February, 1895, is void as against the plaintiff—section 53 of the Transfer of Property Act (IV of 1882); *Nowbat* v. *Kamalkasini*[6]. So also was Dhunbai's assignment of 20th February, 1896—*Fatima Bibi* v. *Debna Ch*[7]; *Kashibai* v. *Shripat*[8]; May on Fraudulent Conveyances, pp. 81-85[9]; *Ex parte Lyne*[10]; *Ishan Chunder* v. *Bishu Sirdar*[11]; Civil Procedure Code (Act XIV of 1882), section 276. Dhunbaiji's interest was moveable property and was rightly attached under section 268.

Macpherson and *Rivett Carnac* for the trustees of the settlement:—The settlement is good. It was not a voluntary deed—*In re Johnson*[12]; *Holmes* v. *Penney*[13]; *Freeman* v. *Pope*[14]; *Thompson* v. *Webster*[15]. The attachment was subsequent to the settlement and, therefore, ineffectual.

Lowndes with *Lang* (Advocate General) for defendants Nos. 1, 4 and 5 (Dhunbai, Perozsha and Darasha):—As to Dhunbai's interest under the will—Theobald on Wills, pp. 103, 104, 408; *In re Booth*[16]; *Wetherell* v. *Wilson*[17]; *Gilbert* v. *Bennett*[18]; *In re Coleman*[19]; Jarman on Wills, p. 371. Her assignment of the 20th February, 1896, was good. It was made not to defeat creditors, but to pay them—*Middleton* v. *Pollock*[20]. There was no valid attachment of Dhunbai's interest. That being so, the plaintiff's suit against her does not lie.

TYABJI, J.:—The circumstances under which this suit is filed are as follows:—One Bomanji Darasha Captain died in 1891 possessed of considerable property, both moveable and immoveable, of the aggregate value of about two lákhs of rupees. Bomanji

(1) (1848) 12 Jur., 907.
(2) (1858) 27 L. J. (Ch.), 788.
(3) (1872) L. R., 14 Eq., 49.
(4) (1871) L. R., 6 Ch., 597.
(5) (1895) 2 Ch., 370.
(6) (1896) I. L. R., 23 Cal., 563, 571.
(7) (1893) I. L. R., 20 Cal., 508, 512
(8) (1894) I. L. R., 19 Bom., 697.
(9) (1881) 44 L. T. J. (N. S.), 922.
(10) (1897) I. L. R., 21 Cal., 825.
(11) (1881) 20 Ch. D., 389, 399.
(12) (1856) 3 Kay. and J., 80.
(13) (1870) L. R., 5 Ch., 538.
(14) (1859) 4 Drew, 628.
(15) (1894) 2 Ch., 282.
(16) (1836) 1 Keen, 80.
(17) (1839) 10 Sim., 371.
(18) (1888) 39 Ch. D., 443.
(19) (1876) 2 Ch. D., 104.

left, him surviving, his widow the defendant Dhunbaiji, his two sons the defendants Perozsha and Darasha, and one daughter Meherbai, who has since died.

Bomanji left a will dated 21st July, 1887, probate of which was obtained by two of his executors and trustees, namely, the defendants Dhunbaiji and Jivaji Dinsha Ghandy. The will (Exhibit D) contains various provisions for the benefit of the testator's widow, sons and daughter, and after giving various legacies disposes of the residue of his estate as follows:—In the 8th clause he says (His Lordship read the clause, see *supra*, and continued:—)

The testator's son Perozsha attained his majority some years ago and his son Darasha attained majority in the month of October, 1895.

By decree (Exhibit A) dated 13th day of June, 1895, and passed in Suit No. 177 of 1895, in which the plaintiff's firm of Natha Kerra & Co. were plaintiffs and the defendants Dhunbaiji and Perozsha were defendants, the defendants were ordered to pay to the plaintiff's firm the sum of Rs. 3,976-10 10 and interest thereon at the rate of six per cent. per annum till payment. By an order dated 1st August, 1895, the plaintiff's firm, in execution of the said decree, attached the "rents payable to the defendant Dhunbaiji for the month of July, 1895, by the executors of her husband's estate in terms of the will of her husband" under section 268 of the Civil Procedure Code (Act XIV of 1882).

The first and second defendants as the trustees of the said will thereupon took out a Judge's summons to set aside the said attachment. This summons was made absolute by Mr Justice Starling on 21st September, 1895 (see Exhibit 17), and the attachment was set aside upon the ground that Dhunbaiji was a bare trustee and took no beneficial interest in the rents.

Under an order dated 2nd July, 1895, and made in pursuance of section 274 of the Civil Procedure Code (Act XIV of 1882), the plaintiff's firm attached the immoveable properties belonging to the estate of the said testator on the ground that both the judgment-debtors had an interest therein.

By a Judge's order (Exhibit C) made in the said Suit No. 177 of 1895, and dated the 25th August, 1896, the plaintiff was

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appointed receiver, under section 503 of the Civil Procedure Code, of the attached properties, with power to bring suits, as such receiver, for the realization and collection thereof or otherwise as he may be advised.

This suit has accordingly been filed by the plaintiff as receiver under the above-mentioned order (Exhibit C), praying that the testator's will may be construed and the rights of Dhunbaiji and Perozsha therein may be ascertained and declared, and that the shares of Dhunbaiji and Perozsha in the rents may be paid to the plaintiff in satisfaction of his decree, and that if necessary the estate of the testator may be administered and that the shares of Dhunbaiji and Perozsha may be sold, and the proceeds thereof may be applied in or towards satisfaction of the plaintiff's decree.

The suit was originally filed against the two executors and the two sons of the testator only, but as it appeared from the defendant's written statement that they relied upon an indenture of settlement (Exhibit 13) dated 10th February, 1885, and executed by Perozsha whereby he settled all his share and interest in the estate both of his father and of his uncle Dinsha upon certain trusts, I directed that the trustees of such settlement—that is to say, the sixth and seventh defendants—should be added as defendants. This has accordingly been done.

The defendants also alleged by their written statement that the defendant Dhunbaiji by an assignment (Exhibit 8) executed by her, and dated the 20th February, 1896, surrendered and released her life-interest in favour of the defendant Darasha, and that such interest is not now available for satisfying the plaintiff's decree. The defendants also contended that as a matter of fact, upon the true construction of the will, Dhunbaiji took no interest at all (under the 8th clause) in the testator's immoveable property, and that if she did, such interest has never been validly attached. In other words, the defendants contend that Dhunbaiji under the 8th clause of her husband's will took no beneficial interest at all, but that she was a bare trustee for her children, and that if she did take any interest under that clause it was an interest in moveable property which should have been at-

tached under section 268 of the Civil Procedure Code (Act XIV of 1882); and that it was not an interest in immoveable property, and that, therefore, the attachment under section 274 of the Civil Procedure Code was ineffectual and inoperative.

The defendants, therefore, contended that either Dhunbaiji had no attachable interest at all, or that, if she had, it has now become validly vested in the defendant Dirasha by reason of the assignment of the 20th February, 1896 (Exhibit 8).

As to Perozsha's interest, the defendants contend that it was validly settled for the benefit of himself and his family under the deed of 9th February, 1895 (Exhibit 13), and that, therefore, he had no interest in him which could be attached under the order of the 2nd July, 1895 (Exhibit B), and that the plaintiff's suit should, therefore, be dismissed.

The plaintiff on the other hand contends that Dhunbaiji took a life-interest in the rents of the testator's estate; that such interest is an interest in immoveable property; that it was, therefore, validly attached under section 274 by the order (Exhibit B) and that the assignment of the 20th February, 1896 (Exhibit 8) is, therefore, void as against the plaintiff under section 276 of the Civil Procedure Code. The plaintiff further contends that both the settlement of Perozsha's interest of the 9th February, 1895, and the assignment of Dhunbai's interest of the 20th February, 1896, are void against the plaintiff under section 53 of the Transfer of Property Act (IV of 1882).

I will deal with these various contentions in their order. The first question is, did Dhunbai take any, and if so, what interest under clause 8 of the testator's will? Numerous decisions have been cited to me on both sides, but as the construction of each will must depend upon its own language, taken in connection with all its provisions as a whole, I cannot say that any one of the cases cited to me is exactly decisive of the point I have to consider. But they clearly lay down the principles which the Court ought to bear in mind in construing provisions of this kind, and I gather from these decisions that the Court will not enforce, or treat as obligatory, a mere wish or desire or confidence or hope on the part of the testator that the donee of the fund

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should, or would, or ought to, or is expected to apply it for the benefit of other persons. On the other hand, the Court does regard as binding and obligatory and does enforce a direction or trust in favour of third parties if such a binding obligation can be clearly ascertained from the will: see *Leigh* v. *Leigh*[1]; *Byne* v. *Blackburne*[2]; *Mackett* v. *Mackett*[3]. In *Lambe* v. *James*[4] James, V.C., disapproved of various previous decisions and expressed the opinion that "the officious kindness of the Court of Chancery in interposing trusts, where in many cases the father of the family never meant to create a trust, was a very cruel kindness indeed." See also *In re Hamilton*[5]; *In re Booth*[6] and *Gilbert* v. *Bennet*[7] and White and Tudor Leading Cases (7th Ed.), Vol. II, p. 310.

In the case before me there is a gift to Dhunbaiji for life, "she thereout maintaining, educating and bringing up" the children of the testator. It seems to me, on a consideration of the testator's language, and applying the principles laid down in the authorities above cited, that the testator's intentions would be best carried out by holding that the widow took a life-interest, but subject to the obligations of maintaining, educating and bringing up the children.

By the 7th clause the testator had given to his widow the use of the family dwelling-house and furniture therein for her life, but he has made no provision for her maintenance, and it is, therefore, reasonable to suppose that he provided for her expenses of living, &c., by the 8th clause of his will. Similarly he had given to his two sons the whole of the residue of his estate after the death of his widow, but he had made no provision for their maintenance, &c., during her life-time. By the construction I put upon the 8th clause of the will these defects are cured, and both the widow and the children are amply provided for in those respects.

It appears, however, that both the daughters of the testator are now dead, and that the only two surviving children, namely,

(1) (1848) 12 Jur., 907.
(2) (1858) 27 L. J. (Ch.), 788.
(3) (1872) L. R., 14 Eq., 49.
(4) (1871) L. R., 6 Ch., 597.
(5) (1895) 2 Ch., 370.
(6) (1894) 2 Ch., 282.
(7) (1839) 10 Sim., 371.

Perozsha and Darasha, have already attained the age of majority. They have both finished their education. Besides, in addition to the large property they take under the testator's will, about two lákhs of rupees, they have both obtained a very considerable fortune (about Rs. 1,56,000) under the will of their uncle Dinsha (Exhibit E), and neither of them is now in any need of being maintained by Dhunbaiji. I, therefore, hold that the obligation imposed upon Dhunbaiji has now been discharged and that she is now entitled to a life-interest free from all further obligations to maintain the testator's children (see *In re Coleman*[1]; Jarman on Wills, pp. 371-72).

As to the nature of the interest taken by Dhunbaiji, I am of opinion that it must be regarded as immoveable property as defined in section 2, clause 5, of the General Clauses Act (I of 1868) in so far as it is a benefit arising out of land. I do not think that it can be regarded as a mere maintenance under section 266 of the Civil Procedure Code (Act XIV of 1882). It follows, therefore, that, in my opinion, Dhunbai's interest was properly and effectually attached on the 2nd July, 1895, by the order (Exhibit D) under section 274 of the Civil Procedure Code, and that, therefore, the assignment of the 20th February, 1896, (Exhibit 8) is invalid against the plaintiff under section 276 of the Civil Procedure Code.

I am, however, further of opinion that even independently of the attachment (Exhibit B), Dhunbai's assignment to her own son Darasha must be held to be invalid as against the plaintiff under section 53 of the Transfer of Property Act (IV of 1882). It is clear that all the parties to the deed of assignment knew of the plaintiff's decree and of his efforts to obtain satisfaction by attachment of the property of both the judgment-debtors. The express object of the assignment seems to me to have been to protect the property from creditors and that it was designed to defeat the plaintiff's decree and, therefore, I must hold it to be fraudulent and void as against the plaintiff.

Moreover, I must look upon the consideration of Rs. 12,560 stated in the deed as grossly inadequate, in as much as in my

(1) (1888) 39 Ch. D., 443.

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opinion the value of Dhunbai's interest amounting to over Rs. 600 per month (see Exhibit F) was worth a great deal more than the consideration paid for it. Under these circumstances I must hold that Dhunbai's interest has been validly attached and is available in satisfaction of the plaintiff's decree.

As to Perozsha's contention that but for the deed of settlement of 9th February 1895 (Exhibit 13) it has been validly attached by the order of the 2nd July, 1895. Is then that deed valid against the plaintiff? The defendants contend that it is valid, because the object of the settlement was not to delay or defeat the creditors, but to make a provision for the benefit of Perozsha and his family after paying off all the then known creditors of Perozsha (see Exhibit 6 A), and that the consideration of Rs. 21,703-1-0 mentioned in the deed was a sufficient valuable consideration to support the deed. I am, however, of opinion that the defendant's contention cannot be supported. The consideration in question was the proceeds of certain shares belonging to the estate of the testator (see Exhibit 6) to which Perozsha and Darasha were absolutely entitled subject to the life-interest therein of Dhunbaiji herself. It is true that the shares, &c, were sold in order to pay off the debts of Perozsha. It is also true that they could not have been sold without the consent of Dhunbaiji and Darasha. It must be remembered, however, that Dhunbaiji herself was largely indebted to various creditors jointly with Perozsha, and that no less than Rs. 5,000 out of the proceeds of Rs. 21,703-1-0 went to pay debts which were due jointly by Perozsha and Dhunbaiji herself. So far, therefore, as Dhunbaiji is concerned, she cannot be regarded as having paid any appreciable valuable consideration for the settlement. As to Darasha, the utmost that he gave up was his reversionary interest in one-half of the proceeds after Dhunbaiji's death. Taking, therefore, his interest at the highest, the consideration moving from Darasha cannot be put at more than about Rs. 9,000 or Rs. 10,000. This amount I regard as grossly inadequate considering the enormous value of Perozsha's interest in the property which was made the subject-matter of the settlement, and which at the very least cannot be worth less than rupees one lákh and twenty thousand.

So far, therefore, as the valuable consideration is concerned I consider that it was grossly inadequate. But, further, Darasha was a minor, both at the time of the sale of the shares, *i.e.*, in the latter part of 1894, and at the time of the settlement itself. In fact, he did not attain his majority till October, 1895. It is obvious, therefore, that his consent to the sale of the shares and to the provisions of the settlement was, at the time it was given, entirely futile. It is true that he ratified the settlement on the 22nd October, 1895, after attaining his majority, but that fact, I think, makes no difference, as the decree had then been brought to his knowledge. Under sections 10 and 11 of the Indian Contract Act (IX of 1872) he was not (in February, 1895) competent to bind himself by any valid contract. See *Fatima* v. *Debnath*[1], *Kashiba* v. *Shripat*[2], which throw doubt upon the earlier decisions, *Sashi Bhusan* v. *Jadunath*[3], *Hanmant* v. *Jayarao*[4], and *Mahomed Arif* v. *Saraswati*[5]. It is not, however, necessary for me to decide whether an agreement by a minor is absolutely void or only voidable at his option. It is enough for me to hold in this case that Darasha did not give sufficient consideration, and that even if he did, he was not absolutely bound by the deed of the 9th February, 1895.

Moreover, the sale of shares, &c., had taken place four or five months before the actual execution of the deed (see Exhibit 6) and although there may have been a talk about the settlement about August or September, 1894, I am not satisfied that the actual terms or provisions of the settlement were discussed, much less definitely agreed upon, much before February, 1895. Perozsha was at Hyderabad up to the end of 1894, and it is apparent to me that he was a very unwilling party to the deed.

Now, it is admitted that although the plaintiff's decree (Exhibit A) was not obtained till the 13th June, 1895, yet the two notes upon which it was based were signed by Perozsha and Dhunbaiji in January, 1895. Besides, there were other notes (Exhibits G, H, I and J) which were also signed in January, 1895, and all of which were unpaid at the date of the settlement. It is admitted

(1) (1893) I. L. R., 20 Cal., 508.
(2) (1894) I. L. R., 19 Bom., Ap., 700.
(3) (1885) I. L. R., 11 Cal., 552.
(4) (1888) I. L. R., 13 Bom., 50.
(5) (1891) I. L. R., 18 Cal., 252.

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that Perozha and Dhunbaiji, who executed the notes, must have known that they were outstanding, and that the deed of settlement must necessarily delay or defeat the creditors. They cannot, therefore, be regarded as having acted in good faith in respect of these notes. So far as the trustees are concerned, I think, however, there was no fraud, and that they had no knowledge of these debts. It is also possible that Darasha also was not aware of them. At the same time it is clear that no enquiry was made and no questions were asked either to Dhunbaiji or Perozsha. The enquiries as to the creditors were made in August-September, 1894, and considering the extravagant and reckless character of both Dhunbaiji and Perozsha I must consider the absence of further later enquiries right up to the date of the deed as an important, though perhaps a perfectly *bonâ fide*, omission.

Under these circumstances I must hold that the deed of settlement of the 9th February, 1895, is void as against the plaintiff under section 53 of the Transfer of Property Act, 1882. In coming to this conclusion I have, of course, not omitted from my consideration the authorities cited at the bar, namely, *In re Johnson* [1], *Holmes* v. *Penney* [2], *Freeman* v. *Pope* [3], *Thompson* v. *Webster* [4], all of which have a more or less strong bearing on the case before me. These authorities clearly establish that, if valuable consideration is given at the time of the execution of the deed, if the consideration is not shown to be grossly inadequate or illusory, if it is not proved that it was the direct intention of the parties to defeat or delay the creditors, if the parties were acting in perfect good faith and if there was no knowledge and much less intention on the part of the persons from whom the consideration moved to defeat any of the creditors, then the deed would be valid, otherwise not. As I have found these points against the defendants, I must hold that the deed is bad as against the plaintiff. I am, therefore, of opinion that the plaintiff is entitled to realize the share and interest both of Dhunbaiji and of Perozsha so far as may be necessary to satisfy his decree.

(1) (1881) 20 Ch. D., 389, 394.
(2) (1856) 3 K. and J., 90.
(3) (1870) L. R., 5 Ch. Ap., 538.
(4) (1859) 4 Dr., 628.

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I will now proceed to record my findings upon the issues. (Having stated his findings His Lordship continued:—) and I pass a decree for the plaintiff and I appoint the plaintiff a receiver to receive the moneys due to Dhunbaiji under the 8th clause of the will until the amount of the decree in Suit No. 177 of 1895 is satisfied, and I direct that for the purpose of satisfying such decree the interest of the said Dhunbaiji and of Perozsha respectively in the estate of the testator or so much thereof as may be necessary should be sold by the Commissioner, and that the proceeds thereof should be applied in or towards the satisfaction of the plaintiff's decree and the costs of this suit. The defendants must pay the plaintiff's costs of this suit and must bear their own costs. The trustee-defendants to get their costs as between attorney and client out of their respective trust estates.

Decree for plaintiffs.

Attorneys for the plaintiffs:—Messrs. *Payne, Gilbert and Sayani.*

Attorneys for the defendants:—Messrs. *Wadia and Ghandy.*

ORIGINAL CIVIL.

Before Mr. Justice Candy.

DHURAMSEY SOONDERDAS AND OTHERS, PLAINTIFFS, *v.* AHMEDBHAI HUBIBBHOY, DEFENDANT.*

1898.
July 28.

Landlord and tenant—Lease for a year—Whole rent paid in advance—Destruction of premises before expiration of lease—Right of tenant to a refund of rent paid in advance—Apportionment—Transfer of Property Act (IV of 1882), Sec. 108, Cl. (e)—Contract Act (IX of 1872), Sec. 65.

In April, 1896, the defendant let to the plaintiffs one compartment in a certain godown for storing goods for twelve months for a sum of Rs. 1,159 and a second compartment in the same godown for twelve months for Rs. 1,368. The plaintiffs entered into possession. In August, 1896, in accordance with the practice the plaintiffs paid the said two sums in advance to the defendant and got a receipt. On the 30th October, 1896, without any default of the plaintiffs the whole godown including the said two compartments was destroyed by fire and rendered wholly unfit for the purpose of storing goods. The plaintiffs thereupon sued for a refund of a proportionate part of the money

* Small Cause Court Case, No. $\frac{247}{7349}$ of 1897.

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paid to the defendant, relying upon section 108, clause (*b*), of the Transfer of Property Act (IV of 1882) and section 70 of the Contract Act (IX of 1872).

Held, that the suit must be dismissed. The consideration was for the whole year. The lease was, therefore, void and inoperative, and the plaintiffs, under section 65 of the Contract Act (IX of 1872), the defendant, who had received the whole consideration, was not entitled to recover any portion of that part which had failed.

On the 1st April, 1896, the defendant let to the plaintiffs a compartment in a certain godown known as the Nicol Mill Godown, situate at Colaba in Bombay, for twelve months (*i. e.*, from 1st April, 1896, to 31st March, 1897) for the sum of Rs. 1,459.

On the 26th April, 1896, he let to the plaintiffs a second compartment of the same godown for twelve months (*i. e.*, from 25th April, 1896, to 24th April, 1897) for the sum of Rs. 1,368. The plaintiffs entered into occupation of both the compartments.

On the 28th August, 1896, in accordance with the custom, the plaintiffs paid the said two sums (*viz.*, Rs. 1,459 and Rs. 1,368) to the defendant in advance, and the defendant passed a receipt for the amount.

On the same day the plaintiffs also paid the defendant a further sum of Rs. 213 as "tenant taxes" for the said two compartments for the above period, the same being payable to the defendant under the terms of the letting, and the defendant gave a receipt.

The plaintiffs stored their goods in the said compartments and occupied them until the 30th October, 1896, on which day the whole godown, including the said two compartments, was destroyed by fire and rendered wholly unfit for the purpose for which it was let, without any default of the plaintiffs.

On 17th November, 1896, the plaintiffs wrote to the defendant claiming a refund of part of the amount paid by them for the year's occupation of the two compartments. The defendant refused to refund anything.

The plaintiffs thereupon brought this suit claiming to be refunded a proportionate part of the above-mentioned sums paid by them to the defendant.

They claimed a refund of Rs. 605 in respect of the first compartment of the said godown, and of Rs. 684 in respect of the

second, and Rs. 108 in respect of taxes. They further claimed Rs. 61 as interest at 6 per cent. from the date of the destruction of the godown, making a total of Rs. 1,158.

The suit was originally filed in the Court of Small Causes, but on application of the defendant (under section 39 of Act XV of 1882 as amended by Act I of 1895, section 13) it was transferred to the High Court.

Rivett-Carnac for the plaintiffs:—The plaintiffs have paid rent for a whole year, but they have only had the use of the godown for six months. They are, therefore, entitled to be refunded part of the money they have paid to the defendant. Under clause (*e*) of section 108 of the Transfer of Property Act (IV of 1882), the premises being destroyed, the lease for a year became void at the plaintiffs' option on the 30th October, 1896. On the 17th November, 1896, they wrote a letter to the defendant exercising this option. Only half the term of the lease had then expired, but they had paid the defendant the rent for the whole year. Under section 65 of the Contract Act (IX of 1872) the defendant is bound to restore so much of the amount paid as represents the rent for the unexpired part of the term. See also section 56 of the Contract Act. As to apportionment, see section 33 of Act IV of 1882.

Kirkpatrick for the defendant:—The plaintiffs are not entitled to any refund. The sections cited do not apply to a case like this. Section 108, clause (*e*), of the Transfer of Property Act (IV of 1882) does not provide for or intend a refund. The words "shall be void" merely mean that after the time at which the lessee has exercised his option the lease shall be no longer operative or enforceable (see Contract Act IX of 1872, section 2, clause *j*). The case contemplated by the whole section is clearly that of a lease providing for occupation and for periodical and concurrent payment of rent accruing during such occupation. In such a case when the contract becomes void these rights come to an end. But the section does not apply to the case of an entire contract executed and completed like this. It does not undo what has been done. Here the plaintiffs paid a lump sum and at once fully acquired the right to use the godown for a year.

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The contract was then completely executed and could not become void retrospectively. Both parties had done all that the contract required. The plaintiffs had paid the price and the defendant had handed over the godown. The fact that an accident afterwards happened, which deprived the plaintiffs of the benefit which they expected to enjoy for a year, did not affect the contract itself. The defendant did not guarantee the godown's safety for a year. Section 56 of the Contract Act does not apply. The illustrations show that it refers only to executory contracts; to cases in which something remains to be done under the contract by the person who has received the advantage and which he ought to do; in that case because he cannot do it he must restore the advantage. But here nothing remained to be done by defendant. He had done his part. He had given over the godowns to the plaintiffs. The money paid was not rent. It was the price or premium (see section 105). The transaction was analogous to a completed sale. A buyer who bought and paid for and obtained goods to last him for a year could not recover part of the price from the seller, if after six months a large portion of them was destroyed. Section 65 of the Contract Act does not make A liable to compensate B for B's misfortune. As to English law, see Leake on Contracts (3rd Ed.), 598; *Izon* v. *Gorton*[1]. Further, on the principles laid down in *Marriott* v. *Hampton*[2] the plaintiff cannot succeed. The godowns were really let for the monsoon and the plaintiffs had the benefit. After the rains the godowns were not nearly so valuable. The Court cannot apportion the rent.

Rivett-Carnac in reply:—This was not a sale but a lease, and the relationship and liabilities of landlord and tenant lasted for a year. As to what these liabilities are, see section 108 of the Transfer of Property Act (IV of 1882). The lease was not an executed but an executory contract. There must be apportionment—Cunningham and Shephard's Notes on Contract Act (8th Ed.), p. 194. There is no evidence that these godowns are more valuable in the monsoon.

CANDY, J.:—On the first issue my finding is for the plaintiffs. There can be no doubt that the godowns were by the fire rendered

(1) (1839) 5 Bing. N. C., 501. (2) Smith, L. C., Vol. II, p. 409.

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substantially and permanently unfit for the purpose of storing cotton. The roof was completely destroyed and also part of the walls. According to defendant's own showing he claimed against his Insurance Company for a total loss, and he admitted that it would have taken one month and a half to make the building permanently fit. The engineer employed subsequently by him says three months. There is some mention in the evidence about a tarpaulin instead of a roof; no such offer was made by the defendant after the fire, and if it had been made, it would have been rightly declined by the plaintiffs. As the engineer showed, the value of a building for storing cotton with a tarpaulin instead of a proper roof would be considerably lessened.

The offer made by defendant not long after the fire was to supply accommodation in other godowns. This the plaintiffs were entitled to decline. The offer to put a suitable roof was not made till 30th November. This, as shown before, would have taken a considerable time.

I have, therefore, no doubt as to clause (c) of head A of section 108 of the Transfer of Property Act (IV of 1882) applying, and thus plaintiffs as lessees had the option of treating the lease as void. They exercised their option by their letter of 17th November, 1896, when they asked for a refund of a proportionate amount of rent. In my opinion they cannot treat the lease as void from the date of the fire (30th October). They were bound to give notice to the lessor, and this they in effect did by their letter of 17th November. They may fairly be treated as having been in occupation up to that date, for their damaged cotton in the godowns was sold by the Insurance Company on 10th November, and the purchasers would have a few days to remove what was sold to them. I do not believe that the plaintiffs continued in occupation after 17th November, 1896. The defendant's servant, Mancharji Edalji, gave his evidence badly. Even according to his own showing, he and his master's watchmen were in charge of the building.

Thus the question is, whether the plaintiffs are entitled from 17th November, 1896, to a refund of a proportionate share of what was called by the parties the "rent" of the godowns. The rent

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according to the plaintiffs' letter of 9th May, 1896, was Rs. 1,600 for one godown and Rs. 1,500 for the other: total Rs. 3,100, or, as a superstitious man with his fondness for odd figures would put it, Rs. 1,601 / *less* Rs. 1,501, total Rs. 3,102. But when the bills were presented by defendant to plaintiffs in August, 1896, and full payment was made, the "rent" was split up into—

Brokerage	Rs	62
Tenant taxes	„	213
Rent	„	1,159 / 1,368
	R.	3,102

And when the notice of the 17th November was made, the claim was for a refund of a proportionate amount of the rent, *viz.*, the above items, excluding the brokerage. The same claim is apparently made in the plaint, except that an item of Rs. 61 is added for interest at 6 per cent. from the date of the fire. This cannot be allowed, nor was it claimed in the notice of 17th November. We must calculate the full "rent" as Rs. 3,010, and if a refund of a proportionate amount can be decreed, the date from which the calculation must commence is 18th November, 1896. In the absence of any evidence on the point, the calculation must be made according to the number of days for which the lease of each godown was void from and including 18th November, 1896, to the end of the year's lease. Very possibly the occupation of the godowns was more valuable to the lessees in the monsoon than in the fair weather; but no evidence has been adduced on that point. There is no material from which the Court can appreciate the difference in rental in the seasons. If, for instance, evidence had been led to show that a godown fetching an annual rental of Rs. 1,500 would be let for the monsoon only for Rs. 1,000, there would have been material on which the Court could act. But there is none in the present case. The only course then is to calculate the number of days for which the lease of each godown was taken, and to see what part of 365 days that period comes to.

Thus the sole remaining question is whether such a refund can be claimed according to the law in India. It is of no use to look at English cases. According to English law the lease in such

a case as this would not become void (Woodfall's Landlord and Tenant, 15th Ed., pp 134, 581, 627). Also it must be admitted that there is nothing in the Transfer of Property Act providing for refund of any part of the rent in such a case. But the question is whether section 65 of the Contract Act (IX of 1872) is applicable, which provides that when a contract becomes void, any person who has received any advantage under such contract is bound to restore it, or make compensation for it, to the person from whom he received it.

On this question the learned counsel on both sides have adduced no authority. I have simply to find whether there are any circumstances which take the case out of the clear words of the section. There is no doubt that the agreement between the parties was that the consideration for the promise on defendant's part to lease the godowns for a whole year should be paid by plaintiffs to defendant in a lump sum at any time in the year when demanded. The consideration was so paid in August, 1896. That consideration was for the whole year. But the lease—that is, the whole contract—has become void. Therefore defendant, who has received the whole consideration, is bound to make compensation for that portion which has failed. The right to compensation does not depend on the possibility of apportionment (see Cunningham and Shephard's Notes to Section 65 of the Contract Act, IX of 1872). I am unable to find any principle which would take the case out of the plain language of the section. Judgment, therefore, must be for the plaintiffs with costs. Interest on judgment at 6 per cent.

Decree for plaintiffs

Attorneys for the plaintiffs:—Messrs. *Mansukhlal, Damodar and Jamsedji.*

Attorney for the defendant:—Mr. *M. N. Saklatwalla.*

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1897.
December 13.

KESHAV AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* VINAYAK AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Jurisdiction—Immoveable property—Civil Procedure Code (Act XIV of 1882), Sec. 16—Varshásans charged on village in Nizám's territory and paid in the same territory—Suit to establish title to a share in such varshásans—Plea of jurisdiction.

An objection to jurisdiction may be raised at any stage of a suit even after remand by the High Court in second appeal.

Plaintiffs filed a suit in the Court of the First Class Subordinate Judge at Násik to establish their right to a certain share in two *varshásans* (annual allowances). The allowances were charged on the revenues of two villages in the Nizám's territory, and paid to the defendants by the treasury officers at Aurangabad in the same territory. The plaintiffs alleged that the *varshásans* were granted to a common ancestor of the parties and enjoyed as joint ancestral property, while the defendants contended that the allowances were granted to their grandfather as his exclusive property to descend to his heirs, and that plaintiffs had no right to share in them.

Held, that the Nasik Court had no jurisdiction to try the suit. The *varshásans* were immoveable property, and there being a *bonâ fide* claim of title to them, the claim should be determined according to the law in force in the Nizám's dominions. The suit should therefore be brought in the Courts of the Nizám, in whose territory the *varshásans* were granted and paid.

Plaintiffs could not claim a declaration of title or ask for a refund of the allowances in a British Court, merely because the defendants happened to be residents in British territory.

SECOND appeal from the decision of J. B. Alcock, District Judge of Násik.

The plaintiffs sued for a declaration of their title to a one-third share in two ancestral *varshásans* (or annual allowances) received by the defendants from His Highness the Nizám's Government, and also to recover their share for the year 1890.

The *varshásans* were charged on the revenues of two villages situate in the Nizám's territory, and were paid to the defendants by the treasury officers at Aurangabad in the same territory.

* Second Appeal, No. 606 of 1897.

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The suit was filed in 1891 in the Court of the First Class Subordinate Judge at Násik, where the defendants happened to reside at the time.

Defendants pleaded (*inter alia*) that the Court had no jurisdiction to entertain the suit, and that the *varshásans* were the self-acquired property of their father, in which the plaintiffs were not entitled to any share.

The Subordinate Judge rejected the plaintiffs' claim, holding that they had not proved their right to the *varshásans* in suit.

On appeal the District Judge raised the following issue only :—

"Have the defendants proved their exclusive right to the *varshásans* in suit, or have the plaintiffs proved their right to share in it?"

On this issue the District Judge found for the plaintiffs, and awarded their claim.

Thereupon the defendants preferred a second appeal to the High Court.

The appeal came on for disposal before a Division Bench (Jardine and Ranade, JJ.), which being of opinion that the case had not been properly dealt with by the District Judge, reversed his decision and remanded the case for a fresh hearing.

After remand, the District Judge raised a new issue, *viz.*, whether the Court had jurisdiction to hear this suit?

He found this issue in the negative and dismissed the suit. His reasons were as follows :—

"The allowances in dispute are a charge on the revenue of two villages in the Nizam's territory and are paid by the Nizam's Government. *Primâ facie*, therefore, the Nasik Courts have no jurisdiction to entertain a suit brought to establish a title to a share in these allowances. The property in dispute is immoveable property, and under section 16 of the Code of Civil Procedure the present suit ought to be instituted in the Court within the local limits of whose jurisdiction that property is situated. There is a proviso to this section, but the explanation appended to the section shows that the proviso can only relate to property situate in British India. There can be no doubt that the section does not extend the jurisdiction of the Násik Courts to property situate in a Native State."

Against this decision the plaintiffs appealed to the High Court.

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M. B. Chaubal, for appellants (plaintiffs):—The Násik Court has jurisdiction. The present suit is not one for the determination of any right or interest in immoveable property. It is really a suit to recover money, and to obtain a declaration that the plaintiffs have a right to take every year a certain sum of money from the defendants out of the cash allowances received by them. The right to draw the allowances from the Government treasury may be immoveable property, but the right to receive a share of the allowances when drawn by the defendants is not immoveable property. So far as the plaintiffs' share is concerned, it is money had and received by the defendant to plaintiffs' use—*Morbhat* v. *Gangadhar*[1].

But even assuming that the suit is one relating to immoveable property, the proviso to section 16 of the Civil Procedure Code (Act XIV of 1882) would give jurisdiction to the Court at Násik, as the defendants reside at Násik, and the relief sought can be entirely obtained through their personal obedience. All that we seek is to make the defendants personally liable to pay us our share. We ask for a decree against the defendants personally; the Násik Court is competent to pass that decree and enforce it against the defendants.

Lastly we contend that it was not open to the District Judge to raise the question of jurisdiction after the case had been remanded by the High Court. The case was remanded for a rehearing on the merits. It was then too late to raise the plea of jurisdiction—*Ratanshankar* v. *Gulabshankar*[2], *Tamalji* v. *Jaidanji*[3].

Shivram V. Bandarkar, for respondents:—This is a suit to establish plaintiffs' title to immoveable property, the claim for arrears being merely incidental to the main relief. An interest in a *varshásan* allowance is immoveable property—*Balvantrav* v. *Purshotam*[4]; *Maharana Fatesangji* v. *Desai Kalliarayaji*[5]; *Collector of Thána* v. *Hari Sitaram*[6]. That being so, the suit will not lie in any Court in British India, as the *varshásans* are charged on villages situate in a Native State and payable in that

(1) (1883) I. L. R., 8 Bom., 234.
(2) (1867) 4 Bom. H. C. Rep., 173, A. C. J.
(3) (1868) 5 Bom. H. C. Rep., 137, A. C. J.
(4) (1872) 9 Bom. H. C. Rep., 99.
(5) (1873) 10 Bom. H. C. Rep., 281
(6) (1882) I. L. R., 6 Bom., 546.

State. The Courts cannot entertain suits relating to immoveable property situate outside their local jurisdiction—Civil Procedure Code (Act XIV of 1882), section 16. The proviso to this section applies only when the property is situate in British India—*Prem Chand Dey* v. *Mokhoda Debi*[1], *Vithalrao* v. *Vaghoji*[2], *Crisp* v. *Watson*[3]. As to the English rule, see *The British South Africa Company* v. *Companhia De Moçambique*[4]; *In re Hawthorne*[5]. It is objected that the question of jurisdiction was raised too late. But the point was taken by the defendants in their written statement. But even if not, the plea of jurisdiction can be raised at any stage of a suit.

M. B. Chaubal, in reply:—I admit that if this suit had been brought by the whole family to establish their title to the *varshásans* in question, the Násik Court would have had no jurisdiction. But this is a suit by one branch of the family against another branch to recover its share of the *varshásans* after they are received from the Nizám's Government. It is thus a suit for money had and received to the plaintiff's use.

PARSONS, J.:—Two points arise for immediate decision in this appeal:—

1. Whether after remand by this Court the Judge of the lower appellate Court could dispose of the case on a point of jurisdiction?

2. Whether the Court of first instance had jurisdiction to hear the suit?

1. The case of *Temulji* v. *Fardunji*[6] was relied on by the appellants on the first point. That, however, was a very peculiar case, and it was only held in it that "as the case was remanded for retrial on its merits, the Judge had no authority to look into the question of jurisdiction which was then raised before him for the first time." In the present case the objection was taken in the Court of first instance and formed the subject of the 5th issue there. This Court did not remand the case for retrial on the merits, but remanded the appeal for a fresh hearing in con-

(1) (1890) I. L. R., 17 Cal., 699.
(2) (1892) I. L. R., 17 Bom., 570.
(3) (1893) I. L. R., 20 Cal., 689.
(4) (1893) A. C., 602.
(5) (1883) 23 Ch. D., 743.
(6) (1868) 5 Bom. H. C. Rep., 137, A. C. J.

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sequence of the defective and faulty hearing (see Second Appeal No. 554 of 1894, decided 26th November, 1895). It is settled law that an objection to jurisdiction may be raised at any stage of a suit, even for the first time in second appeal: see *Sayad Nyamtulla* v. *Nana*[1]; *Velayudam* v. *Arunachala*[2]. It could only be on the ground of acquiescence or waiver that a Court would be justified in refusing to entertain an objection when raised, and there is the authority of the Privy Council to show that when a Court has no jurisdiction over the subject-matter of a suit, the parties cannot by their actual consent confer that jurisdiction upon that Court—*Meenakshi Naidoo* v. *Subramaniya Sastri*[3].

2. The suit was brought to obtain a declaration that the plaintiffs are entitled to certain share in two *varshásan* allowances charged on the revenues of the villages of Vaijpur and Thoskargaon in the territories of His Highness the Nizám and paid by the treasury officers at Aurangabad in the same territories, and to recover the amount of that share for the year 1890 from the defendants, who are alleged to have been paid the whole of the allowances at Aurangabad. The *varshásan* allowances are immoveable property. Mr. Chaubal, for the plaintiff-appellants, admitting this and admitting also that a suit by the family to establish its right to the *varshásans* could not be brought in British India, has argued that the suit will lie against the defendants who reside in British India to recover from them the share to which the plaintiffs allege they are entitled, because the relief claimed can be entirely obtained through the personal obedience of the defendants. He relies on the proviso to section 16 of the Code of Civil Procedure. The explanation, however, to that section shows that property in it means property situated in British India, which these *varshásans* are not. Before the plaintiffs can get a decree against the defendants for the money amount they claim, they must prove their right to the share they claim in the *varshásan* allowances themselves. They allege that right and very properly ask the Court in this suit to determine it; the suit is, therefore, one for the determination of a right to, or interest in,

(1) (1888) I. L. R., 13 Bom., 424. (2) (1889) I. L. R., 13 Mad., 273.
(3) (1887) L. R., 14 I. A., 160; S. C. I. L. R., 11 Mad., 26.

immoveable property situated outside British India, and it is, I think, quite clear that a Court in British India has no jurisdiction to hear such a suit. In the case of *The British South Africa Company* v. *The Companhia De Moçambique* [1], it was decided that the Supreme Court of Judicature had no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad, and it was there admitted that the Court could not make a declaration of title or grant an injunction to restrain trespasses over such land. In the case of an estate in land or of a right annexed to such an estate, "as property of this kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the state in which it depends" (Story, Conflict of Laws (8th Ed.), section 553 at page 771). In *In re Hawthorne; Graham* v. *Massey* [2], Kay, L. J., says: "I am not aware of any case where a contested claim depending upon the title to immoveables in a foreign country strictly so called, being no part of the British dominions or possessions, has been allowed to be litigated in this country simply because the plaintiff and defendant happened to be here," and after citing some cases thus concludes: "But the case is infinitely stronger where the contested claim is based upon the right to land, where that land is situate not in Scotland but in Dresden, where the question whether the plaintiff has any claim or not must be determined by the law of Saxony as to immoveables, and where the only ground for instituting proceedings in this country is the fact that the defendants are resident here. All these circumstances concur in this case and in my opinion the Courts of Civil Judicature in *England*, which sit, as Lord Westbury said in *Coolney* v. *Anderson* [3], to administer the municipal law of this country, have no authority to determine in such a case as this whether or not the plaintiff's claim is well founded."

This decision is very apposite to the present case where the defendants are in no fiduciary relations with the plaintiffs, are not bound by contract with them, and the claim is not based upon a suggestion of fraud. It is a *bonâ fide* claim on both sides

(1) (1893) A. C., 602. (2) (1883) 23 Ch. D., 74).

(3) (1862) 1 De J. & S., 365.

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of title to the *varshásan* allowances paid by the Government of the Nizám which the plaintiffs say were granted to a common ancestor of the parties to be enjoyed as ancestral property, while the defendants say that they were granted to their grandfather as his own exclusive property to descend to him and his heirs. This claim will have to be determined according to the law in force in the Nizám's dominions. It may be that under it such *varshásans* are impartible, or that they descend to the eldest son only, or that they are subject to some other special mode of devolution or even of disbursement. It may be that, under some such form of Pensions Act as is here in force, claims to such allowances are not cognizable by the Civil Courts, but are left for the decision of the ruling power itself. In the present case that power has seen fit to pay the allowances to the defendants. I am of opinion that if the plaintiffs feel themselves aggrieved at this, they must apply to that power for redress or sue in the Courts of the country in which the *varshásans* were granted and are paid, and that they cannot claim a declaration of their title or the refund of the allowances in the Courts of this country, merely because the defendants happen now to be residents here. We confirm the decree with costs.

RANADE, J.:—In this case the original suit was brought by the appellant-plaintiffs to establish their right to a specific share in two *varshásans* payable out of the revenues of two villages in the Nizám's territories, and received from the Aurangabad treasury by the respondents Nos. 1—5 as representing the eldest branch of the common family of the parties. Appellants stated that they had received their share of the allowances down to 1883-84, since which time respondents had refused to pay, and along with the establishment of their rights to share the allowances, appellants claimed a specific sum for one year's share. The respondents Nos. 1—5 denied the appellants' right to a share in the allowances, which they claimed as the self-acquisition of their own immediate ancestor; and among other objections they urged that the Násik Court had no jurisdiction to try the suit. Though an express issue was laid down on this point of jurisdiction, the Court of first instance did not decide it, as it found that the appellants had failed to establish their right.

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The District Court in appeal reversed this decree, and awarded the whole claim. In Second Appeal, (No. 551 of 1894), the decree of the District Court was reversed, and the case was remanded for a fresh hearing. In the inquiry on remand, the District Judge held that the Násik Court had no jurisdiction to entertain the suit, and he accordingly dismissed the appeal.

In the present appeal, Mr. Chaubal has taken exception to this decision on two grounds: (1) that the question of jurisdiction should not have been raised at this late stage in the District Court; and (2) that the Násik Court had jurisdiction, as the plaint sought to establish the personal liability of the respondents to pay to the appellants their share in the allowance at Nasik.

I agree with Mr. Justice Parsons in holding that neither of these two contentions is well founded. As regards the first point, our attention was drawn to the ruling of this Court in *Temulji* v. *Fardunji*[1] in which it was no doubt laid down that when the High Court has remanded a suit for retrial on the merits, the lower appellate Court has no authority to raise a question of jurisdiction for the first time. The present case may, however, be distinguished on the ground that here the question of jurisdiction had not been raised for the first time in the remand inquiry. The defence had been specially pleaded in the Court of first instance at the earliest stage of the inquiry. Moreover, this Court has always held that a question of jurisdiction may be raised at any stage even in second appeal, and also after a remand order which directed an inquiry into the merits —*Bhai Trimbakji* v. *Tomu*[2]; *Motilal* v. *Jamnadas*[3]; *Krishnarao* v. *Muncherji*[4]; *Ganpatrav* v. *Bai Suraj*[5]. The Madras High Court has similarly ruled that the question of jurisdiction is not of such a technical character that the appellate Court can properly disregard it—*Keshava* v. *Lakshminarayana*[6]; *Veerayudam* v. *Arunachala*[7]. This is also the view of the Calcutta and Allahabad High Courts—*Chowdhry Wahid Ali* v. *Mullick Inayet Ali*[8]; *Nidhi Lal* v. *Mazhar Husain*[9]. Even if the lower appel-

(1) 5 Bom. H. C. Rep., 137, A. C. J.
(2) (1865) 2 Bom. H. C. Rep., 92.
(3) (1865) 2 Bom. H. C. Rep., 40.
(4) P. J. for 1873, Case No. 49.
(5) (1870) 7 Bom. H. C. Rep., 79.
(6) (1882) I. L. R., 6 Mad., 192.
(7) (1883) I. L. R., 13 Mad., 273.
(8) (1870) Ben. L. R., 52.
(9) (1884) I. L. R., 7 All., 280.

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late Court had not raised the question, it is plain that in the present appeal, respondents could have raised it before us, and it would have been incumbent upon us to consider it. This first point of the appellants' pleader's contention must, therefore, be overruled.

His second ground of objection, namely, that the Násik Court had jurisdiction to try the suit, turns upon the consideration whether the appellants' claim in the Nasik Court falls under the description of the class of suits referred to in section 16, or whether it falls under section 17 of the Civil Procedure Code; in other words, whether it is a suit for the determination of any right or interest in immoveable property, or is a suit which seeks to fix a personal liability upon the respondents. The plaint, and the valuation of the claim which was raised to ten times the value of the appellants' share of the allowance, show clearly that the appellants sought a determination of their interest in immoveable property. The *varshásan* allowances are admittedly immoveable property, and the difference which divided the Judges in *The Collector of Thána* v. *Krishnanath Govind*[1] has no bearing in the present dispute. As the appellants' right to a share was contested by the respondents, they could only succeed by establishing their title to a share in the allowance. Where the right was not in dispute, or was otherwise established, the claim to receive any one or more years' share would certainly be a claim to fix a personal liability on the respondents, and as such maintenable in the Court within whose local jurisdiction the cause of action for money had and received arose. This was the case in the matter of the *varshásan* allowance referred to in *Ratanshankar* v. *Gulabshankar*[2] on which ruling the appellants' pleader chiefly relied. The High Court there held that there was jurisdiction to try a suit in which money due for a share in some Gáikwádi allowance was received by the defendant on his own and plaintiff's account, even though the question of title might incidentally arise. In the present case the question of title does not incidentally arise. It is the principal point in dispute, the claim for one year's allowance being only a corollary to it. The distinction noted above was affirmed in *Chintaman* v.

(1) (1880) I. L. R., 5 Bom., 322. (2) (1867) 4 Bom. H. C. Rep., 172.

Madhavrav[1]. The evident object of the detailed provisions of section 16 is to limit jurisdiction in respect of claims to immoveable property to the Court within whose local jurisdiction such property may be situated, and as a rule Indian Courts have no power to decide on rights and interests in immoveable property lying outside their local jurisdiction—*Prem Chand Dey* v. *Mokhoda Debi*[2]; *Sreenath* v. *Cally Doss*[3]; *Srimati Kamini Soondari* v. *Kali Prosunno*[4]. This same view was approved in *Crisp* v. *Watson*[5], and in *Land Mortgage Bank* v. *Sulaiman*[6] a claim for the specific performance of a contract relating to the sale of property outside local jurisdiction was disallowed, though such a claim was decreed by this Court on its Original Side in *Holkar* v. *Dadabhai*[7] on the analogy of the practice of Equity Courts in England. This analogy should, however, not be pressed too far. On the strength of this same analogy a suit to recover money charged on immovable property was at one time held by this Court to be not a suit for land—*Balvantrao* v. *Purshotam*[8], but the latest decision has now established an accord between this and the other High Courts, which have held that such suits fell under section 16—*Vithalrao* v. *Yaghoji*[9]. There is no allegation of any trust in this case such as distinguished the claim in *Juggodumba* v. *Puddomoney*[10], and in respect of which relief could be claimed in equity by constraining the conscience.

On the whole, it is clear that the present suit fell within the substantive clause of section 16, and that it is not covered by its proviso, for complete relief cannot be obtained by the personal obedience of the respondents in this case. The District Judge, therefore, very properly rejected the claim. The present appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(1) (1869) 6 Bom. H. C. Rep., 29 (A.C.J.)
(2) (1890 I. L. R., 17 Cal., 699 at p. 703.
(3) (1879) I. L. R., 5 Cal., 82.
(4) (1885) L. R., 12 I. A., 215.
(5) (1893) I. L. R., 20 Cal., 689.
(6) (1892) I. L. R., 19 Cal., 358.
(7) (1890) I. L. R., 14 Bom., 353.
(8) (1872) 9 Bom. H. C. Rep., 99.
(9) (1892) I. L. R., 17 Bom., 570.
(10) (1875) 15 Ben. L. R., 318.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IN RE KRISHNAJI PANDURANG JOGLEKAR.*

1897. December 13.

Criminal Procedure Code (Act X of 1882), Secs. 167, 167 and 344—Remand of prisoners in police custody—Security to keep the peace—Magistrate's power to demand such security from persons residing out his local jurisdiction.

Under section 167 of the Code of Criminal Procedure (Act X of 1882) the period for which a Magistrate can authorize the detention of the accused in police custody is fifteen days on the whole, including one or more remands.

A Magistrate cannot call upon a person residing beyond his local jurisdiction to give security against a breach of the peace within that jurisdiction.

In re Jai Prakash Lal (1), *In re Abdul Aziz* (2), *In re Rajendro Chunder Roy* (3), *Dinonath Mullik* v. *Girija* (4) and *Queen-Empress* v. *Pagadu* (5) followed.

THE accused Krishnaji Pandurang Joglekar was a schoolmaster residing in Bombay. On the 14th August, 1897, he was arrested in Bombay on suspicion of having committed murder. He was taken to Poona on the same day and placed before the City Magistrate, before whom he stated that he had been engaged for some time in collecting funds from the citizens of Poona for the purpose of getting up a rebellion, and that with this object he had come to Poona on the 30th July, 1897, and had applied to several persons for aid, but without success.

After this statement was recorded, the police applied to the Magistrate for leave to detain the accused in their custody for fourteen days for the purpose of making further inquiries into the matter. This application was granted.

On the 25th August, 1897, the police asked for a further remand for fourteen days from the 28th August, 1897. This application was also granted, but the Magistrate did not record any reasons, nor apparently was the accused produced before the Magistrate when this application was made.

On the 1st September, 1897, the City Police Inspector laid information before the Sub-divisional Magistrate of Poona, upon

* Criminal Revision, No. 312 of 1897.

(1) (1883) I. L. R., 6 All., 26.
(2) (1891) I. L. R., 14 All., 49.
(3) (1885) I. L. R., 11 Cal., 737.
(4) (1885) I. L. R., 12 Cal., 133.
(5) (1887) I. L. R., 11 Mad., 98.

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which proceedings were instituted against the accused under section 107 of the Criminal Procedure Code (Act X of 1882) and he was called upon to furnish security to keep the peace in a bond for Rs. 8,000, together with two sureties for Rs. 4,000 each.

The accused having failed to furnish the required security was committed to prison for one year.

The accused thereupon applied to the High Court in Revision to quash the whole proceedings as illegal and *ultra vires*.

M. R. Bodas for accused:—The accused is a resident of Bombay. He did not reside either at the time of his arrest, or when information was formally laid against him, within the local jurisdiction of the Sub-divisional Magistrate of Poona. The Magistrate had, therefore, no power to call upon him to give security to keep the peace under section 107 of the Code of Criminal Procedure —*In the matter of the petition of Jai Prakash Lal* [1]; *In the matter of the petition of Rajendro Chunder Roy* [2]; *Dinonath Mullik* v. *Girija Prosonno* [3]. His being in police custody at the time the information was laid against him, would not give jurisdiction to the Magistrate; the police custody was itself illegal.

Ráo Bahádur *Vasudev J. Kirtikar*, Government Pleader, for the Crown:—It is admitted by the accused that he was in Poona on the 30th July, 1897, and that he was then endeavouring to collect funds for the purpose of getting up a rebellion. The information laid against him refers to this fact. And it is this circumstance which led to the present proceedings. His residence in Poona even for a single day on this occasion for the purpose of creating a public disturbance would give jurisdiction to the Magistrate under section 107 of the Criminal Procedure Code—*Shama Charan* v. *Katu Mundal* [4]. As to his detention in police custody for more than fifteen days, the Magistrate says that the remands were granted under section 344 of the Code. If so, the detention was not illegal.

PARSONS, J.:—In this case the applicant was called on by the Magistrate to furnish security to keep the peace in his own bond for Rs. 8,000, with two sureties for the sum of Rs. 4,000 each,

(1) (1883) I. L. R., 6 All., 26.
(2) (1885) I. L. R., 11 Cal., 737.
(3) (1885) I. L. R., 12 Cal., 133.
(4) (1897) I. L. R., 24 Cal., 344.

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and in default was committed to prison for a year. Before disposing of the case, we wish to draw the attention of the Magistrate to the illegality he committed in leaving the applicant in the custody of the police for so long a time. He was arrested, it appears, on the 14th August at Bombay on suspicion of having committed murder, and was placed before the Magistrate at Poona on the same day by the police, who asked for leave to detain him in their custody for fourteen days. The Magistrate granted the application. Section 167, Criminal Procedure Code, requires him to record his reasons.

On the 25th August the police asked that he might be detained by them in their custody for a further term of fourteen days counting from the 28th. This the Magistrate allowed, again recording no reasons. It does not appear whether the applicant was on this occasion produced before him, the law requires that he should be.

Now the period for which a Magistrate can authorize the detention of the accused in police custody is fifteen days on the whole. This is quite clear from the words used in section 167, and has been so ruled in the case of *Queen-Empress* v. *Engadu* (1). The Magistrate's order, therefore, of the 14th August was illegal. The Magistrate in his proceedings in the present case says that "remands were given from time to time to complete police investigation—section 344, Criminal Procedure Code." This section, however, relates to proceedings in inquiries or trials, and has nothing to do with police investigation, and it contemplates a remand to jail and not to police custody. In the present case the reports of the police and the endorsement of the Magistrate show that the detention was asked for and granted under section 167, so that the reference of the Magistrate to section 344 is not quite accurate.

The present proceedings were commenced and completed against the applicant while he was in the custody of the police at Poona. It is admitted that he is a resident of Bombay. The information laid against him on the 1st September states this, and it charges him with having gone to Poona on the 30th July

(1) (1887) I. L. R., 11 Mad., 98.

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and there done something with a view to commit a breach of the peace. It appears that he was only at Poona this one day, and that his mission failed. It has been ruled by both the Calcutta and the Allahabad High Courts that a Magistrate cannot call upon a person residing beyond his local jurisdiction to give security against a breach of the peace within that jurisdiction —*In the matter of the petition of Jai Prakash Lal* (1); *In the matter of the petition of Abdul Aziz* (2), *In the matter of the petition of Rajendro Chunder Roy Chowdhry* (3), *Dinonath Mullik* v. *Girija Prosonno Mookerjee* (4). We must follow these decisions. The case of *Shama Charan* v. *Kalu Mundal* (5) has no application, for there was a residence at the time when the Magistrate received information and instituted proceedings. There may in the present case have been such a residence on the 30th July as would have justified proceedings then, but there was none on the 1st September and subsequent days, for we cannot hold that a detention in police custody even if legal would be residence. For this reason we reverse the order of the Magistrate at Poona.

Order reversed.

(1) (1883) I. L. R., 6 All., 26.
(2) (1891) I. L. R., 14 All., 49.
(3) 1885) I. L. R., 11 Cal., 737.
(4) (1885) I. L. R., 12 Cal., 133.
(5) (1897) I. L. R., 24 Cal., 344.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

HARI GANESH AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* YAMUNABAI (ORIGINAL DEFENDANT), RESPONDENT.*

1897.
December 14.

Limitation Act (XV of 1877) Art 179, Cl 5—"Date of issuing notice" meaning of the words—Execution of decree—Orders in execution proceedings —Res judicata—Withdrawal of application for execution—Effect of such withdrawal.

Article 179, clause 5, of the Limitation Act (XV of 1877) applies only where the notice under section 248 of the Code of Civil Procedure (Act XIV of 1882) has been actually issued. If no notice is issued, time cannot be counted from the date of the order of the Court; though it may be that where a notice has

* Second Appeal, No. 934 of 1897.

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been issued, the date of its issue would be the date on which the Court ordered its issue.

Orders in execution proceedings if not appealed from, are binding on the parties to the suit in all subsequent proceedings in that suit, on principles analogous to those of *res judicata* strictly so called. It is therefore, necessary to constitute a bar that there should be a hearing and final decision.

Where an application for execution is allowed to be withdrawn the matters in dispute are not heard and decided. There is therefore, no *res judicata*.

SECOND appeal from the decision of Rão Bahádur Thakurdas M., First Class Subordinate Judge at Poona, with Appellate Powers.

On the 13th October, 1886, the plaintiffs obtained a decree for Rs. 2,450 against Yamunabai Saheb, widow of Yeshavantrao Bhau Saheb Powar, of Malthan.

On the 12th October, 1889, the decree-holders presented a darkhást for execution of the said decree.

On the 14th October, 1889, the Court passed an order for the issue of a notice under section 248 of the Code of Civil Procedure (Act XIV of 1882), fixing the 16th November, 1889, for the judgment-debtor to show cause why the decree should not be executed. As, however, the process-fee was not paid, the notice was not issued, and on the 16th November, 1889, the darkhást was struck off.

On the 13th October, 1892, the decree-holders presented a fresh darkhást for execution of the decree and the judgment-debtor was served with a notice under section 248 of the Code of Civil Procedure. On the 21st October, 1892, the decree-holders informed the Court that they did not wish to proceed with the darkhást, as they had come to an amicable arrangement with the judgment-debtor. The darkhást was allowed to be withdrawn with liberty to present a fresh darkhást.

On the 12th October, 1895, the decree-holders filed a third darkhást for the execution of the decree.

This darkhást was opposed by the judgment-debtor on the ground that the darkhást of the 13th October, 1892, having been presented more than three years after the date of the first darkhást, (*viz*, 12th October, 1889) was barred by limitation, and that being the case, the present darkhást was also time-barred.

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The Court of first instance disallowed this contention, and ordered execution to issue.

On appeal, the Judge held that the case fell under clause 4, and not under clause 5, of article 179 of the Limitation Act (XV of 1877), and that the darkhást was barred by limitation. The darkhást was, therefore, rejected.

The decreeholders thereupon appealed to the High Court.

M. B. Chaubal for appellants:—The darkhást of 1892 was not barred by time, as it was made within three years from the 14th October, 1889, that is, the date on which the Court had made an order in the first darkhást proceeding for notice to issue under section 248 of the Code of Civil Procedure. This date should be taken as the date of issuing the notice, and limitation runs from this date under clause 5 of article 179 of the Limitation Act (1877). The expression "date of issuing notice" in this clause means the date on which the order directing the issue of the notice is made by the Court—*Udit Narain* v. *Ramparlab Singh*[1]. Even assuming that the darkhást of 1892 was presented after the prescribed period, it is not open to the judgment-debtor to raise this objection in the present proceeding. He might and ought to have taken the objection in the previous execution proceeding. But he did not do so. The question of limitation is, therefore, *res judicata*.

Ganpat Sadashiv Rao for respondent:—The present case does not fall within clause 5 of article 179 of the Limitation Act. To bring a case within that clause, it is not enough to show that there was an order by the Court for notice to issue under section 248 of the Code of Civil Procedure. It must also be shown that the notice was actually issued. In the present case no notice was issued, as the process-fee was not paid. Clause 5, therefore, does not apply. But clause 4 applies, and under that clause time runs from the date of the previous darkhást. That being so, the second darkhást, having been filed more than three years after the date of the first darkhást, was time-barred. It follows that the present darkhást is also time-barred. As to the question of *res judicata*, the second darkhást having been with-

(1) (1881) Weekly Notes, Allahabad, 147.

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drawn, it must be treated as if it was not made at all, and all matters in issue remained unheard and undecided. There could, therefore, be no *res judicata*—*Manjunath* v. *Venkatesh* [1].

PARSONS, J. :—In this darkhást presented on 12th October, 1895, the defendants took the objection that execution was time-barred, because there had been no step taken in aid of execution within three years from the 12th October, 1889, which was the date of the first darkhast. There had been a darkhást (No. 613) presented on the 13th October, 1892, but that was withdrawn on the 21st December, 1893, liberty being given to present a fresh darkhást.

Two arguments have been addressed to us why the objection should be overruled. 1, that the darkhást of 1892 was in time, and 2, that if not, the point was *res judicata* and could not be taken by the defendants.

1. There was an order passed by the Court on the 11th October, 1889, on the darkhást of 1889 to issue notice under section 248 of the Code of Civil Procedure, and it is argued that time runs from that order. In point of fact, however, no notice was ever issued, and the darkhást was dismissed on the 16th November, 1889, because no *batta* had been paid for the process and because the applicants were not present. Article 179, clause 5, applies only where the notice under section 248, Civil Procedure Code, has been issued. As no notice was ever issued, time cannot here be counted from the date of the order of the Court, though it may be that where an order has been issued, the date of its issue would be the date on which the Court ordered its issue, as was ruled by the Allahabad High Court in the case quoted from the Weekly Notes by the lower Court.

2. Orders in execution proceedings are, if not appealed from, binding on the parties to the suit in all subsequent proceedings in that suit on principles analogous to those of *res judicata* strictly so called. It is, therefore, necessary, to constitute a bar, that there should have been a hearing and a final decision. In the present case there was no decision passed in the darkhást of 1892. It was allowed to be withdrawn. The matters in dispute

(1) (1881) I. L. R., 6 Bom., 54.

were thus hung up and remained in issue between the parties pending the presentation of the fresh darkhast in which they could be again made a ground of defence or attack. This fresh darkhást is the one now before us, and in it it is clear that the defendants can raise the contention of limitation, as it has never before been heard or finally decided. The order in execution is confirmed with costs.

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HARI GANESH v. NARAYAN

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

VINAYAKRAO KESHAVRAO AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), RESPONDENT.*

1897. *December* 20.

Bombay Land Revenue Code (Bom. Act V of 1879, Sections 37, 38, 61—*Scope of Section* 37—*Survey—Omission to number lands at survey—Effect of such omission on owner's rights—Summary settlement—Exclusion of land from summary settlement—Effect of such exclusion—Bombay Act VII of* 1863—*Sanad under the Act—Sanad.*

The plaintiffs, who were the inamdars of certain land, sued for a declaration of their ownership in and of their right to cultivate (1) two plots of land which (they alleged) formed part of their inam, and (2) the bed of a stream which flowed through their land. It was contended for the defendant as to these two plots of land that the plaintiffs had no right to cultivate them, as they had been made a part of a village site, and on that understanding they had not been numbered at the survey in 1863 and had been exempted from assessment for twenty years. As to the bed of the stream, it was contended that the stream was a public stream, and that the bed of the stream as it dried up belonged to Government and not to the plaintiffs.

It was held by the lower appellate Court that section 61 of the Bombay Land Revenue Code (Bombay Act V of 1879) applied, that Government were competent to set apart a portion of the lands comprised in the sanad of the plaintiffs for a village site, and that as these lands had not been numbered at the survey of 1863, and had been exempt from assessment for more than twenty years, the plaintiffs had lost their right to cultivate them. On appeal to the High Court,

Held (reversing the decree of the lower Court) that the plaintiffs were entitled to the declaration prayed for.

Held, also (1) that section 61 of the Bombay Land Revenue Code did not apply. That section relates back to section 38 and both refer only to lands the property

* Second Appeal, No. 618 of 1897.

1897.

VINAYAKRAO v. THE SECRETARY OF STATE FOR INDIA.

of Government in unalienated villages or unalienated portions of villages. They do not empower the Government to confiscate any land belonging to an inámdár and to confer it on the persons living in his village.

(2) That the mere omission to number the plots of land could not have the effect of turning them into a part of the village site, or take away the right of the plaintiffs. Nor did the omission of Government to assess these lands deprive the plaintiffs of them, or make them the property of Government.

(3) That the bed of the stream was the property of the plaintiffs, who owned the land upon its banks.

SECOND appeal from the decision of G. McCorkell, District Judge of Ahmedabad.

The plaintiffs, who were the inámdárs of certain inám lands, which included a village, brought this suit in 1895 for a declaration of their ownership in and of their right to cultivate (*a*) two plots of land forming part of their said village, and (*b*) the bed of a stream which flowed through this village.

The two plots had been admittedly part of the cultivable lands belonging to the plaintiffs, and had formerly been separately numbered under the survey previous to that of 1863.

At the new survey, however, made in that year the two plots were set apart for the village site and were neither numbered nor measured. Nor was the bed of the stream then either numbered or measured.

In 1869 a summary settlement was made with the plaintiffs in respect of the lands of their village and a sanad was issued to them under Bombay Act VII of 1863; but the two plots of land were exempted from the settlement, and so also was the bed of the stream.

The Collector pleaded, in answer to the present suit, that the Government only claimed the power to require the plaintiffs to use the two plots in question as a village site and he contended that as these two plots had been set apart at the time of the new survey in 1863 for the village site, and as on that understanding they had been exempted from assessment, and as plaintiffs had received the benefit of that exemption for more than twenty years, the plaintiffs had no right now to cultivate them. As to the bed of the stream, he contended that it was a public stream and did not belong to the plaintiffs.

The Assistant Judge dismissed the suit, holding that as the two plots of land had been reserved for the village site and left unnumbered at the time of the survey of 1853, the plaintiffs had no right to them, more especially as they had been exempted from assessment for more than twenty years.

As to the water-course, he held that it was not plaintiffs' private property, but was public property coming under section 37 of Bombay Act V of 1879.

This decision was upheld, on appeal, by the District Judge. He was of opinion that as regards the two plots of lands the case was governed by section 61 of the Land Revenue Code (Bombay Act V of 1879). His reasons were as follows:—

"It has been contended that section 61 of Bombay Act V of 1879 is not applicable to the land in suit, but I hold that it is. One of the objects of that section is to prevent lands which Government have set apart for public purposes, being diverted from such purposes. Were it not for that section, village sites could with impunity be ploughed up and cultivated, and villagers would thereby lose what was intended for their benefit. It has been contended that this land has not been included in the sanad of plaintiffs and that it should have been. But I hold that Government were competent to set apart a portion of the lands in the sanad of the plaintiffs for a village site, and that any original grant is modified by a later grant modifying the former. This is really the important contention in the case. * * * * *

"The plaintiffs claim that they have a right to cultivate the village site and derive revenue from it. Government say we have set apart this land to be used only as a village site, and it cannot be cultivated. In my opinion, Government is right."

On these grounds the District Judge agreed with the Assistant Judge in rejecting the plaintiffs' claim.

Plaintiffs thereupon preferred a second appeal to the High Court.

Anderson (with *Ramlatt V. Desai*) for appellants.

Ráo Bahádur *Vasudev J. Kirtikar*, Government Pleader, for the respondent.

PARSONS, J:—There are two subject-matters in dispute in this case, and they will have to be separately dealt with.

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The first is the two plots of land. As to this the District Judge says "admittedly the two plots of land in suit lie within the boundaries of the Jat inám land of the plaintiffs:" and the Assistant Judge says "there is not the least doubt that the village site was originally part of the cultivable land belonging to the plaintiffs, but at the time of the survey in 1853 the land was freshly numbered and the village site was excluded from the numbering with the exception of the *wáda* or compound numbers which were separately numbered." 1853 seems to be a mistake, probably for 1863, but I cannot find any certain information as to the date of the new survey.

The case, therefore, stands thus. These two plots of land were a part of the inám lands of the plaintiffs and used to be separately numbered at the old survey. At the new survey they had no numbers given to them and for this reason the Courts below hold that they have been made a part of the village site over which the plaintiffs have no rights of cultivation. The Assistant Judge does not say how he thinks this could legally have been done. The District Judge says that section 61 of the Bombay Land Revenue Code, 1879, is applicable, and that Government were competent to set apart a portion of the lands comprised in the sanad of the plaintiffs for a village site. I cannot agree with him. Section 61 relates back to section 38 and both refer only to lands the property of Government in unalienated villages or unalienated portions of villages. They do not empower the Government to confiscate any land belonging to an inámdár and to confer it upon the persons who live in his village. Moreover, I do not see how the mere omission to number a plot of land could possibly have the effect of turning it into a part of the village site or take away any existing rights of the plaintiffs to cultivate it. Even if the land had been made a part of the village site, it would still belong to the plaintiffs and they would have the same rights over it as before and as indeed they have over the whole of the village site. There is nothing, so far as I know, to prevent an inámdár letting out his land, either for building or for cultivation, as he pleases, and the argument that, because the plots now form part of the village site, they cannot be cultivated, fails entirely.

The District Judge further seems to think that "as the plaintiffs had themselves procured that the lands in suit should be separated off from the other lands of the inám, and as the lands in suit have now been enjoyed by the plaintiffs rent free for over twenty years, they cannot now claim to prevent Government making use of the provisions of section 61 of the Land Revenue Code." This, however, is a clear misapprehension. The two plots were never separated off from the other lands. They were merely left unnumbered. When the plaintiffs accepted the summary settlement and were granted a sanad for their inám holding, they had to pay a certain amount of quit-rent or assessment for that holding. The fact that Government chose to assess only a portion of the holding, and to allow the plaintiffs to enjoy the rest free of assessment, would not have the effect of cutting off the latter from the holding and of placing it at the disposal of Government. It would still be the plaintiffs' inám land. Government under the Act of 1863 had no power thus to take possession of land. They had the power of levying the full assessment only if after enquiry the holder failed to prove title. This power they did not exercise and they have allowed the plaintiffs to hold the two plots free of assessment for more than twenty years. It is clear that this could not possibly create a title in Government or estop the plaintiffs from asserting their own. Even now Government do not claim the land or any assessment upon it; all they wish to enforce is a proviso that the plaintiffs should not cultivate it. I am of opinion that they have no right to place any such restriction on the plaintiffs' rights of ownership, and would, therefore, give them the declaration that the two plots are their inám property and that they have the right to cultivate them.

The second subject-matter is the bed of a stream or rivulet which runs through this village. The fact whether it has its source inside or outside the village is disputed, but is immaterial. Government claim the right to levy rent or assessment from persons who cultivate the bed of this stream as it dries up; they thus claim the bed as their own property. The plaintiffs contend that the bed belongs to them as riparian owners, and as included in their inám holding. Here again because the bed was

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not numbered or measured so as to be expressly included within the survey numbers formed at the new survey, and was not assessed in the sanad, the Courts below have dismissed the claim. This is, in my opinion, quite wrong. As I have pointed out before, neither the giving nor the omission to give a number to land, works any change in its title, and the inám holding of the plaintiffs would remain the same under the new as it was under the old survey. I have also shown that the omission of Government to assess land separately would not deprive the plaintiffs of the land, or cause it to become the property of Government. The District Judge says that the bed of the stream is public land under section 37 of the Bombay Land Revenue Code, 1879, apparently because "the rivulet does not, as is falsely alleged, terminate within the plaintiffs' limits, but flows on beyond." The point of termination, however, has no effect at all upon title, and section 37 deals only with what is not the property of individuals, and can have no application to the bed of a rivulet which flows through the land of any individual, for it would be the property of that individual who owned the land upon its banks. The plaintiffs own the whole village; they, therefore, own the bed of the rivulet that lies within the boundaries of their village. It is clear that the Government has no right whatever to claim the land of that bed and demand rent from the persons who may cultivate it. I, therefore, would give the plaintiffs a declaration that the bed of the rivulet within their village is their inám land.

We grant the plaintiffs the declarations above mentioned with costs throughout.

RANADE, J.:—In this case the appellants (original plaintiffs) sought as against Government a declaration of their right of ownership in respect of two properties: (1) a village site measuring 15 bighas bounded by plaintiffs' lands on all sides and included in the village which was *jat*-or personal inám of the plaintiffs, and (2) the bed of a stream which flowed through the lands of this inám village. In the plaint it was stated that these two plots were not numbered at the survey, nor a summary settlement made in respect of them by Government at two annas in the rupee as was done in regard to the other lands, and when plaint-

iffs applied that the settlement might be extended to them, the Collector, on behalf of Government, claimed that the plots belonged to Government, and refused to extend the settlement to them.

In his written statement, the Collector, among other defences, urged that as regards the village site, Government only claimed the power to require the plaintiffs to use it as village site, and not to cultivate it, because it was on that understanding that the land was exempted from the settlement, and plaintiffs had received for twenty years and more the benefit of that exemption. In regard to the bed of the stream, the defendant's contention was that it was a public stream, and the land belonged to Government, and not to the plaintiffs, as it was not included in plaintiffs' sanad, and was not in their possession. It will be thus seen that the defence in respect of the village site is to some extent distinct from that urged in respect of the bed of the stream.

The Court of first instance in its judgment has found in regard to the village site that it was originally part of the cultivable land belonging to the appellants-plaintiffs, and further the fact of this inclusion of the land in plaintiffs' inám was not denied by Government. Both the Courts below have, however, rejected the appellants' claim to the declaration sought by them about their ownership of these lands, and their right to let them out for cultivation, on the ground that as the lands were not numbered at the survey of 1853, and no quit-rent was fixed in regard to them when the summary settlement was introduced in 1869, the appellants must be held to have acquiesced in the arrangement by which Government allowed these lands to be used only as village site.

I think this view is clearly based on a misapprehension of the legal effects of the operations of the survey and summary settlement of lands. If at a survey certain lands are not numbered or assessed by reason of their being kharáb, it does not follow that the ownership of such land is thereby injuriously affected or curtailed. Numbering or surveying do not by themselves create or destroy rights. Similarly, the exclusion of these lands from the summary

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settlement would not of itself have the effect of curtailing the owner's rights. Their exclusion would only not protect these lands from an inquiry into the title of the inámdár to hold them rent free. Sections 38 and 61 of the Revenue Code, on which much stress has been laid in the judgments of both the lower Courts, have plainly no application here, because they relate only to Government lands, and they confer no power on Government to interfere with the private rights of the inámdár to use his property in the way most advantageous to him.

The whole question turns upon the title of the appellants to, and their possession of, these lands as being part of their inám village. As long as that title and possession are admitted by Government, no question of acquiescence or estoppel can arise merely from the fact that the appellants did not see any occasion to go up to Government, and apply for an extension of the summary settlement to these lands. In the argument before us the Government Pleader urged that, in case a declaration was granted to the appellants in regard to their ownership of these lands, it should be made subject to the right of Government to assess these lands if it deemed proper to do so. Government has admittedly taken no steps till now to claim any assessment for these lands, and such a declaration cannot, therefore, be made in this suit at the present stage. As regards the fixing of the quit-rent of 2 annas in the rupee, no declaration seems necessary, as the appellants-plaintiffs expressly asked Government in 1886 to levy such judi on these lands, and it was the refusal of Government to do so that necessitated this litigation.

As regards the bed of the stream, it is admitted that the stream flows through the inám lands of the appellants' village. The stream takes its rise in land No. 1352 of the village, and it flows only when rain falls, and is dry at other times. As the stream is included within the boundaries of the inám village, it is immaterial whether it is included or excluded from the measurements of particular survey numbers. The appellants as the owners of the lands on both sides are proprietors of the bed of the stream. As regards the levy of assessment by Government for the use of the bed of the stream, the evidence shows that the

levy was first made in 1886, and not in 1881 as was contended before us. Both the Courts have found that the claim was not time-barred.

On the whole, the appellants have clearly established their claim to the declaration sought by them, namely, that both the village site and the bed of the stream belong to them as being part of the inám village, and that the defendant has no right to interfere with appellants' use of both the plots for cultivation or otherwise.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BABAJI RAMJI AND OTHERS (ORIGINAL DEFENDANTS), APPLICANTS, *v.* BABAJI DEVJI AND OTHERS (ORIGINAL PLAINTIFFS), OPPONENTS.*

1897. *December* 20

Jurisdiction—Mámlatdár—Mámlatdárs' Act (Bom. Act III of 1876), *Sec.* 4—*Disputes between riparian proprietors.*

A Mámlatdár's Court has no jurisdiction to determine questions arising between riparian proprietors as to the amount of water each can take from a stream.

A suit will lie in a Mámlatdár's Court where a person has been dispossessed or deprived of the use, or when he has been disturbed or obstructed, or when attempt has been made to disturb or obstruct him in the use of water of which he is in possession or was in possession within six months before suit.

APPLICATION under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiffs sued for an injunction in the Mámlatdár's Court under the following circumstances.

Plaintiffs and defendants were riparian proprietors of lands situate on the banks of a rivulet, defendants' lands being situated higher up the stream than that of the plaintiffs.

There were several dams erected in the bed of the stream for the purpose of regulating the flow of water to the lands of the different riparian proprietors. One of these dams belonged to the plaintiffs and another to the defendants. The distance between the two dams was 62 cubits.

*Application under Extraordinary Jurisdiction, No. 185 of 1897.

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Plaintiffs alleged that in the defendants' dam there had always been a sluice or passage left through which the water flowed down to the plaintiffs' dam and there come to a head that they had always used the water so collected to irrigate their rice lands in the hot season. They complained that in October, 1895, the defendants, contrary to the established practice, erected a solid dam without any sluice or passage in it and thereby stopped the supply of the water to their (the plaintiffs') lands. They, therefore, prayed for an injunction directing the defendants to open a sluice in their dam, and restraining them from causing any obstruction in future to the passage of the water on to the plaintiffs' dam.

The defendants pleaded that there never had been any sluice or passage in their dam, and that the plaintiffs' user, if any, had not been obstructed by them.

The Mámlatdár found in favour of the plaintiffs, and made an order on the defendants, that "at the time of building their dam in the month of Kartik every year or about that time, they should, according to the *ahwál* (or established practice), leave a sluice one foot in length and half a foot in height for the purpose of supplying water to the plaintiffs."

Against this order the defendants applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* to set aside the above order.

V. G. Bhandarkar, for the plaintiffs, showed cause.

H. C. Coyaji, for the defendants, *contra*.

PARSONS, J.:—This case raises an important question of jurisdiction under the Mámlatdárs' Courts Act 1876. The parties are riparian occupants of lands situated on the banks of a rivulet, the land of the defendants being higher up the stream than that of the plaintiffs. In order to regulate the flow of water, dams are erected in the bed of the stream and thus a head of water is obtained which is led off by channels into the adjacent fields. There are, it seems, no less than six of such dams, of which the plaintiffs own one and the defendants another. Each of the owners is by custom allowed to take a certain quantity of

water, leaving the rest to flow over his dam to the dam of the next owner.

The plaintiffs allege that as their dam is very close to the defendants', being only 62 cubits below it, the custom is that the defendants should not have a solid dam but one with a sluice or passage left in it, so that the water should not be dammed up very much, if indeed at all, by the dam, but should flow on to their dam and be there brought to a head, and that in the month of Kartik, 1896, the defendants, in breach of that custom, erected a solid dam, and they sue for an injunction that the defendants should be ordered to open a passage in their dam and should not disturb or obstruct the flow of water.

The Mámlatdár raised the issues mentioned in section 15 (*c*) of the Act. He did not, however, record any findings thereon, but he decided that "an injunction be issued to the defendants that at the time of building their dam in the month of Kartik every year, or about that time, they should, according to the *vahivat*, leave a sluice one foot in length and half a foot in height for the purpose of supplying water to the plaintiffs."

The question is, whether he had jurisdiction to hear such a suit and grant such an injunction. We are of opinion that he had not. We think that a person can only sue under the Act when he has been dispossessed or deprived of the use, or when he has been disturbed or obstructed, or when an attempt has been made to disturb or obstruct him in the use of water of which he is in possession or was in possession within six months before suit. A owns a well or water course, which is in his possession. If B prevents A taking water therefrom, or takes water therefrom himself, a suit will properly lie; but if A owns one portion of a water-course and B another, and if B takes from his portion more water than he is entitled to, so that a less amount flows down to A, we conceive no suit would lie in a Mámlatdár's Court, because A never was in possession of the use of the water in B's water-course and no obstruction has been caused to A's use of the water that might be in his water-course. If such a suit lay, then the injunction would have to be not merely that provided by Schedule (*c*) of the Act, but an order on the defend-

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ant to do, or to refrain from doing, something with his own property such as is actually in possession of the Mamlatdar in this case, for which no authority exists under the Act. It is obviously unfair that the [illegible] between the [illegible] from [illegible] Court [illegible] It is equally [illegible] of water which [illegible] have, by excluding them from [illegible] stream, caused injury to the [illegible]. We are of opinion that such a suit does not come within the Mamlatdars' Courts Act. We make the rule absolute with cost

Rule made absolute.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Pratt.

1897. *December* 20.

QUEEN-EMPRESS v. GANESH RAMKRISHNA.*

Criminal Procedure Code (Act X of 1882), ss. 195 (3)—Sanction to prosecute—Revision—Sessions Judge's power to revoke or modify order granting sanction.

A Sessions Judge, having once refused to revoke a sanction granted by a Subordinate Court under section 195 [illegible] of 1882), has no jurisdiction to revise such order or to alter the sanction.

An application to a Sessions Judge to revoke a sanction granted under section 195 of the Code is a criminal proceeding and any order passed in such a proceeding is final, and cannot be reversed or revised by him.

APPLICATION under section 439 of the Code of Criminal Procedure (Act X of 1882).

The accused Ganesh Ramkrishna Pathak, having obtained a decree against one Gangaram bin Sankaji in the Court of Small Causes at Poona, applied for execution of this decree without certifying to the Court certain payments which had been made in part satisfaction of it. Thereupon the Small

* Criminal Revision, No. 321 of 1897.

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EMPEROR v. RAMKRISHNA.

Cause Court granted a sanction under section 195 of the Code of Criminal Procedure (Act X of 1882) to prosecute him for an offence under section 210 of the Indian Penal Code (Act XLV of 1860). He applied to the Sessions Judge to revoke the sanction, but the Sessions Judge on 6th April, 1897 declined to interfere.

The accused subsequently made another application to the Sessions Judge, who thereupon reviewed his previous order, and on 21th August, 1897, revoked the sanction, giving the following reasons:—

"Looking to the fact that the proceedings in a Court of a subordinate Judge and of a Small Cause Court Judge are under the same civil, it appears to me that any application to revise and upset the order of the Court under section 195 of the Criminal Procedure Code must be in the nature of a civil proceeding, notwithstanding the fact that the application in the case of a Small Cause Court Judge is made to the Court of Session. Whether this view of the law is sound or no, I am further of opinion that it is competent to a Court acting in its capacity of a Court of revision to reconsider its order, and for reasons shown to review the order of the Court by Section 197 of the Criminal Procedure Code confers upon it the ordinary revisional powers. In Bombay Criminal Rulings for 1890, No. 18, dated 14th September, 1890, it was held that it was competent to a District Magistrate to order a further inquiry under section 437, although he may have declined to do so on a previous occasion in the same matter. The case of *Queen-Empress* v. *C. P. Fox*[1] was relied upon by the other side to show that the High Court cannot review its judgment pronounced on revision in a criminal case. That case was a peculiar one ..... It was held by a Full Bench that it had not power under section 439 of the Criminal Procedure Code to review its judgment pronounced on revision in a criminal case. Nothing was said as to its powers under section 195, nor its powers of revision in a civil case. ..... On these grounds I am of opinion that it is open to this Court in its revisional capacity to review its former order."

Against this order Gangaram, the judgment-debtor, applied to the High Court under its revisional jurisdiction.

Invernarity (with him *N. G. Chandavarkar*), for the applicant:—The Sessions Judge had no jurisdiction to review his previous order and revoke the sanction. The proceedings before him were not of a civil, but criminal nature. It has been held that the High Court cannot review its orders passed on revision in criminal cases—*Queen-Empress* v. *C. P. Fox*[1]. If the High Court

(1) (1885) I. L. R., 10 Bom., 176

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cannot, much less can the Sessions Court review its orders passed in revision.

Shivram V. Bhandari [illegible]:—Proceedings for sanction to prosecute, when initiated in a Civil Court in the course of a civil suit are of a civil and not criminal nature. In *Dirubhai* v. *Rajbai*[1] such proceedings were held to be civil and not criminal, and this Court dealt with the matter under section 622 of the Code of Civil Procedure. The Sessions Judge had, therefore, jurisdiction to review his previous order. Assuming that proceedings under section 195 of the Criminal Procedure Code are of a criminal nature, there is nothing to prevent a Criminal Court from exercising the power of review which is inherent in every Court, unless it is expressly taken away by statute. Section 369 of Act X of 1882 no doubt prevents a Criminal Court from reviewing its judgment after it is signed. But the order that was reviewed by the Sessions Judge in the present case is not a judgment—sections 366-368. None of the conditions stated in those sections apply to the order in question. Nor does section 430 apply, as it relates to judgments and orders of an appellate Court. But the order in question was admittedly passed by the Sessions Judge in his revisional capacity—*Mehdi Hasan* v. *Tota Ram*[2]. The ruling in *Queen-Empress* v. *C. P. Fox*[3] does not apply, as that was a case of a conviction on a trial. Here there was no trial and no conviction.

PARSONS, J.:—The only point before us is whether the Sessions Judge, having refused on the 6th April to revoke the sanction, had jurisdiction to review his order and revoke it on the 24th August. I entertain no doubt that the proceedings before the Sessions Judge in the matter of the application to revoke the sanction were criminal proceedings, and that his order of the 6th April was an order passed in revision and not by way of appeal. This being so, it is quite clear, from the decision of this Court in *Queen-Empress* v. *C. P. Fox*[3] and of the Allahabad High Court in *Mehdi Hasan* v. *Tota Ram*[2], that the order could not be reviewed. The latter is a decision exactly in point, for in it

(1) P. J., 1889, p. 123.
(2) (1892) I. L. R., 15 All., 61.
(3) (1885) I. L. R., 10 Bom., 176.

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the Court held that its order rejecting an application to revise an order granting sanction was final and could not be reviewed by it. If the High Court has no power to review its order, the Court of Sessions can have none. We set aside the order of 24th August.

RANADE, J.:—The only question we have to consider in this case is whether the Sessions Judge, after once passing an order declining to interfere with the sanction granted by the Small Causes Court Judge, could entertain a fresh application, set aside his previous order, and revoke that sanction. The authorities seem to me to be clearly against the exercise of any such power by the Sessions Judge in respect of orders passed under section 195. There is no provision in the Civil Procedure Code on the subject of granting sanctions to prosecute. These provisions occur only in section 195 and in chapter 35 of the Criminal Procedure Code, and it has been held that proceedings taken under section 195 are judicial in their nature, and not ministerial, (*Laraiti* v. *Ram Dial*[1]). The procedure of granting sanction to a private party is only an alternative of the more direct procedure of complaint by the Court before whom the offence is committed. In a case which came before us by way of appeal on a point of limitation from an order of dismissal passed by Mr. Justice Candy, we confirmed his order, and held that proceedings under section 195 held on appeal before a District Court were criminal, and not civil, proceedings. The first application to the Sessions Judge, which he disposed of by declining to interfere, was thus a criminal proceeding, and he had no power to admit a review, or to revise his order in the way he has done. Section 369 expressly provides that no Court other than a High Court can alter or review its own judgment, and section 430 expressly provides that all judgments and orders of appellate Courts are final, except in cases provided for by section 417 and Chapter 32. Section 417 relates to appeals by Government, and Chapter 32 relates to references and revision. This latter procedure is obviously intended to be a substitute for review in criminal proceedings. The Allahabad High Court has ruled that an application to a Sessions Judge to set aside a sanction granted under section 195, is a proceeding in revision—*Mehdi Hasan* v. *Tota Ram*[2]. See

(1) (1882) I. L. R., 5 All., 224. (2) (1892) I. L. R., 15 All., 61.

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[illegible] Ibid. 1[illegible] [illegible]. The Sessions Judge's [illegible] [illegible] [illegible]

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IN RE JAMNADAS HARINARAN.

APPLICATION under section 435 of the Code of Criminal Procedure (Act X of 1882).

The accused was charged under section 61 of the Indian Stamp Act (I of 1879) with passing a receipt for Rs. 22 on behalf of his master without affixing a stamp to it.

He admitted having written the document, but contended that it was not a receipt. His case was that one Umed Bhagvan paid Rs. 22 to Kushal Vesta and desired a *Chhitta* or memorandum, to be made of the payment, and that he accordingly made a memorandum in writing to the following effect :—"Kushal Vesta has received Rs. (22) twenty-two." This memorandum was not signed by Kushal Vesta.

The Magistrate, however, held that the document was a receipt and that it had been passed by the accused for money paid to him on behalf of his master, one Kushal. He, therefore, convicted the accused under section 61 of the Indian Stamp Act, 1879, and sentenced him to pay a fine of Rs. 4.

On appeal the District Magistrate confirmed the conviction and sentence.

Thereupon the accused moved the High Court under its Revisional Jurisdiction.

K. M. Javheri for the accused.

Ráo Bahádur *V. J. Kirtikar*, Government Pleader, for the Crown.

PARSONS, J.:—The applicant has been convicted of an offence under section 61 of the Indian Stamp Act, 1879, in that he passed a document chargeable with stamp duty without affixing a proper stamp thereto.

The document referred to is said to be a receipt for a sum of Rs. 22. The original is not on the record of the case, but the copy filed, which we presume to be correct, runs thus :—"Kushal Vesta has received Rs. 22." The applicant admits that he wrote this document. His account is that Umed Bhagvan paid Rs. 22 to Kushal Vesta, and that he made this as a memorandum of the payment. The Magistrate finds that Kushal Vesta is a mistake for Kushal Moti, that Kushal Moti paid to the applicant Rs. 22

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which he owed to the maker of the applicant, and that the applicant gave him the document, which thinks that it is a receipt, in as much as it [illegible] Rs. 22 had been received. It is difficult to [illegible] to such an extraordinary [illegible] Vesta was not examined [illegible].

The [illegible] document is a receipt. For the determination of this question we must look at the document to see what it purports to be. [illegible] Kushal Vesta has received Rs. 22. To constitute a receipt is not sufficient that there should be a statement, there must be an acknowledgment, either express or signified or imported. It is clear in the present case that there is none. Kushal Vesta acknowledges nothing. The applicant merely writes out a memorandum of the fact that certain moneys were received by a certain other person. This memorandum cannot be held to be a receipt within the meaning of the Indian Stamp Act, section 3 (17). We reverse the conviction and sentence and acquit the applicant.

Conviction reversed.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

1897. *December* 23.

BALVANTA APPAJI WHATKAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* BIRA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS *

Vendor and purchaser - Deposit - Right of purchaser to return of deposit — Lien of purchaser for the part of the purchase-money paid by him.

A purchaser of land who has paid part of the purchase-money by way of deposit, but who afterwards unjustifiably repudiates the contract of purchase, or is guilty of any default by reason of which the sale is not carried out, is not entitled to recover the deposit from the vendor.

The vendor is not necessarily entitled to retain the deposit merely because under the circumstances the Court refuses to grant specific performance against him.

From the moment part of the purchase-money is paid, the purchaser has a lien upon the property to that extent, which lien can only be lost to him by reason of his failing to carry out his part of the contract.

* Second Appeal, No. 425 of 1897.

1897.

BALVANTA v. BIBA.

SECOND appeal from the decision of Rao Bahádur G. V. Limaye, First Class Subordinate Judge of Belgaum, with appellate powers.

Suit by purchaser against vendor (defendant No. 2) and others for return of deposit.

The suit as ultimately framed was to recover the sum of Rs. 712 paid by the plaintiff as part of the purchase-money of the land in question and to make it a charge on the land.

Defendant No. 1 was the original owner and vendor. Defendant No. 2 was a purchaser of part of the land under a contract subsequent to the sale to the plaintiff. Defendant No. 3 held a mortgage upon the land.

It was alleged that the land was already sold in execution, that the court sale was set aside on the application of the first defendant, who was permitted by the Court to re-sell the land by a private sale to the plaintiff for Rs. 2,000. It was alleged that by agreement Rs. 1,258 out of this sum was to be paid by the plaintiff to the third defendant in discharge of his mortgage, when the term of the mortgage should expire. The rest of the amount, *viz.*, Rs. 712, was paid into Court to be divided between defendant No. 1 (the vendor) and others under the agreement. This sum of Rs. 742 was paid into Court in December, 1891, the sale being thus cancelled.

In accordance with this arrangement a deed of sale of the land was executed by defendant No. 1 (vendor) to the plaintiff and was handed over to the latter, but was never registered by him.

The land remained in possession of the mortgagee (defendant No. 3).

In June, 1894, defendant No. 1 sold part of the land to defendant No. 2.

In December, 1894, the plaintiff filed this suit. In the first instance he prayed for a declaration that the land belonged to him and that he was entitled to redeem the mortgage of defendant No. 3 and for other relief, but on settlement of issues the plaintiff was content that the only question should be whether he was entitled to recover the Rs. 742 with interest and to make that sum a charge on the whole of the land.

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BALVANTA v. BIRA.

Defendants Nos. 1 and 2 pleaded that the Rs. 712 had not been paid by plaintiff, but had really been paid into Court by defendant No. 1, and that the sale to plaintiff was a sham, and they relied on the fact that the sale-deed had not been registered.

Defendant No. 3 did not appear.

The Subordinate Judge gave the plaintiff a decree for Rs. 742, holding that plaintiff could recover the sum from defendant No. 1 (the vendor), but he refused to make it a charge on the property, as the sale-deed was unregistered.

The plaintiff appealed, contending (1) that the whole land (*i.e.*, the part sold to defendant No. 2 in June, 1894, and the rest) should be charged with the Rs. 712, and (2) that the money should be recoverable from defendant No. 2. The appellate Court, however, confirmed the lower Court's decree.

The plaintiff then appealed to the High Court. Only defendant No. 2 appeared to oppose the appeal. Defendant No. 1 did not appear.

Balaji A. Bhagvat for the appellant (plaintiff).

Narayan V. Gokhale for respondent No. 2 (defendant No. 2).

CANDY, J.:—The facts of this case are these. The land of defendant No. 1 was attached and sold in execution of a money decree obtained by defendant No. 3. In order to induce the Court to set aside the sale, plaintiff was put forward as a purchaser at a far higher price (Rs. 2,000) than had been realized in the Court sale. Accordingly Rs. 712 were paid into Court, to be paid as follows:—Rs. 78-14-0 to defendant No. 3 on account of his money decree, Rs. 200 to the auction-purchaser in consideration of the sale being cancelled, Rs. 59 odd to defendant No. 2, who was another attaching creditor, and the balance to defendant No. 1, the owner of the land. The sum remaining to make up the Rs. 2,000—*viz.*, Rs. 1,258—was to be paid by redemption of the mortgage on the land held by defendant No. 3. The term of the mortgage had not then expired. This cancelment of the Court sale and payment of the Rs. 712 into Court took place in December, 1891.

A deed of sale was executed by defendant No. 1 in the name of the plaintiff and was apparently handed over to the plaintiff.

This deed has not been registered. The land remained in possession of the mortgagee (defendant No. 3). In June, 1894, defendant No. 1 sold part of the land to defendant No. 2 by a registered deed of sale.

In December, 1894, the present suit was filed by plaintiff for a declaration that the whole land belonged to him, and that he was entitled to redeem the mortgage of defendant No. 3, and in the alternative for such relief as the Court might award. On the case coming up for settlement of issues and on the Subordinate Judge expressing an opinion that plaintiff was only entitled to recover the Rs. 742, plaintiff applied (exhibit 10) stating that he was not sure that he would get the land, and prayed that his claim should be confined to the recovery of the Rs. 742 with interest, the sum being made a charge on the whole land.

Defendants Nos. 1 and 2 pleaded that the Rs. 742 had in reality been paid by defendant No. 1, and that the alleged sale to plaintiff was a sham, as was shown by the fact that his deed of sale was never registered. The Subordinate Judge found that defendant No. 1 had failed to prove that he (defendant No. 1) had paid the Rs. 742, and the Subordinate Judge, therefore, held that plaintiff could recover this sum from defendant No. 1, but could not have a charge on the property, as the deed of sale was unregistered. The Subordinate Judge also held that defendant No. 2 certainly knew of the sale to plaintiff. He ordered plaintiff to bear his own costs, as he was to blame for not getting the deed of sale registered.

Plaintiff appealed to the District Court, urging that the Rs. 742 should be made a charge on the whole land (both the part sold to defendant No. 2 and also the part not sold), and that the money should be recoverable from defendant No. 2. The Subordinate Judge, A. P., found that the Rs. 742 were not a charge on the land, and that defendant No. 2 was not liable. He, therefore, confirmed the decision of the first Court. Against this decision plaintiff has made a second appeal to this Court, defendant No. 2 alone appearing to resist the appeal.

There are two defects in the judgment of the lower appellate Court, which make it difficult for this Court to effectually dis-

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pose of this appeal. In the first place whether defendant No. 1 appealed or not against the decree of the first Court awarding to the plaintiff the Rs. 742 to be recovered from him (defendant No. 1), it is clear that defendant No. 2 can take any objection to the decree appealed against which he could have taken by way of appeal; and it is evident that one of these objections is that plaintiff is not entitled to charge on the land for the Rs. 742, because plaintiff has not proved that he really provided that money. The Subordinate Judge, A. P. has remarked that the decree of the first Court against defendant No. 1 "must be allowed to stand, as the defendant No. 2 in resisting the appeal failed to satisfy me that the lower Court's finding on the third issue is wrong." That issue was "Does defendant No. 1 prove that the sum of Rs. 712 was in reality paid by himself?", and the Subordinate Judge of the first Court found on this issue in the negative. But the *onus* primarily rests on the plaintiff to prove that he furnished the Rs. 742 which he seeks to recover. If he fails to prove this, then there is an end of the case at once as against defendant No. 2, though the decree against defendant No. 1 must be allowed to stand owing to defendant No. 1 not having appealed. The plaintiff naturally points to the recitals in the unregistered deed of sale and in the Court records, which show that he as nominal purchaser paid the money. On the other hand, there is the fact that plaintiff failed to register the deed of sale which was executed by defendant and handed to the plaintiff, and it is possible, therefore, that these recitals are merely formal. It is for the Court to weigh these facts with the other evidence, and to find specifically whether the plaintiff paid the Rs. 742 which he seeks to recover. (See the judgment of the Privy Council in *Chowdry Deby Persad* v. *Chowdry Doulut Singh*[a].) It may be necessary to permit plaintiff to adduce evidence in support of his plea, which owing to the form of the 3rd issue he had no opportunity of giving in the Court of first instance.

In the next place, the question is, whether plaintiff, on proving that he himself furnished the Rs. 742, is entitled to a charge for the same on all or part of the land in suit. The law on this point is clear. Plaintiff cannot be entitled to charge for the

(a) (1844) 3 M. I. A., 346 at page 354.

Rs. 712, even though he paid the same, if he is not entitled to recover that sum at all; and he is not entitled to recover the sum at all if the contract for sale went off by default on his part. This is clearly put in Fry on Specific Performance (3rd Ed.), section 1187, where numerous authorities are quoted:—

"Where the purchaser after making a payment by way of deposit unjustifiably repudiates the contract, or *it in any other way goes off through his default*, the vendor is, in the absence of stipulation on the point, entitled to retain the money, treating it as having been paid to him as a guarantee for the purchaser's performance of the contract."

It does not follow that if the Court would refuse specific performance, the vendor would be entitled to retain the deposit. This point was brought out in the case of *Howe* v. *Smith*[1]. Cotton, L. J., said:—

"It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it, so as to enable the vendor to retain the deposit."

In the present case plaintiff does not claim specific performance of the contract. It may be that he is not entitled to make such a claim. The seller having executed a proper conveyance (as he was bound to do), the plaintiff may not be entitled to call on defendant to execute another conveyance. It also may be that the plaintiff in the absence of a valid conveyance is not entitled to the declaration which he prayed for in his original plaint. But it does not follow that he is not entitled to a return of the Rs. 742. So, too, with regard to his claim to a charge on the property for the Rs. 712, if he proves that they came from his pocket; the authorities are numerous as showing that from the moment part of the purchase-money is paid, the purchaser has a lien upon the property to that extent, which lien can only be lost to him by reason of his failing to carry out his side of the contract. This is clearly brought out in the leading case of *Rose* v. *Watson*[2]. It was there laid down that if the contract fails, and the failure is not to be attributed to any misconduct or default on the part of the purchaser, the purchaser cannot be deprived of the interest in the estate, which he has acquired by

(1) (1884) 27 Ch. D., 89. (2) (1864) 10 H. L. C., 672.

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his *bonâ fide* payment. In that case the failure of performance was attributable entirely to the vendor. The purchaser had not rejected the contract or put an end to it. He would have been willing to perform it, if the vendor had performed those things which in good faith he was bound to do. On the other hand, *Din* v. *Grant* [1] was a case in which the Court held that the plaintiff purchaser had lost his lien for part payments of purchase-money, because his conduct was quite inconsistent with the idea that the agreement had remained in force.

Now in the present case before us it would seem at first sight that the Subordinate Judge, A. P., did hold that the contract failed entirely on account of default on the part of the purchaser. He said: "The defendant No. 1 has done all that was necessary for him to do for completing the contract, and plaintiff has deprived himself of the same by his own unjustifiable omission to get his deed registered." If the Subordinate Judge, A. P., had stopped there, there might be ground for the contention that he found as a fact that the contract had gone off solely through plaintiff's default. But the Subordinate Judge, A. P., went on to say, "the sale to defendant No. 2 is no doubt a fraudulent transaction." This finding is quite inconsistent with the former finding. If the contract went off owing to plaintiff's default, where and whose was the fraud in defendant No. 1 selling part of the land to defendant No. 2? If there was fraud in the sale of part of the land to defendant No. 2, then there was still a contract, which plaintiff had not rejected or put an end to.

Having regard to these inconsistent findings, the only course open is to reverse the decree of the lower appellate Court and to remand the appeal for rehearing in reference to the above remarks. If the Subordinate Judge, A. P., is of opinion, on the evidence before him (which was adduced on the 4th issue—what relief, if any, is plaintiff entitled to obtain?), that the plaintiff by his conduct showed that he repudiated the contract (assuming of course that plaintiff did really provide the Rs. 742 which were paid into Court), then defendant No. 2 is entitled to a decree, and plaintiff can only recover the money from defendant No. 1 because

(1) (1852) 5 DeG. and S., 451.

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defendant No. 1 did not appeal against the decree of the first Court. But if the Subordinate Judge, A. P., on a review of the noted authorities above is of opinion that plaintiff having really provided the Rs. 742 which were paid into Court, is entitled to recover the same, then as regards defendant No. 2 the question will arise whether plaintiff is entitled to have a charge on the land sold to defendant No. 2. That will depend upon the finding on the issue whether defendant No. 2 had notice of the agreement by defendant No. 1 to sell to plaintiff. No finding was recorded by the Subordinate Judge, A. P., on the question of notice. The remark that "the sale to defendant No. 2 is no doubt a fraudulent transaction" is not a clear finding on the issue. As regards the land not sold to defendant No. 2, the plaintiff is of course entitled to a charge, if he really provided the Rs. 742, and if he has not lost his lien by reason of his failing to carry out his side of the contract.

Decree reversed and appeal remanded. All costs, including costs in this Court, to be dealt with by the Subordinate Judge, A. P., at the rehearing.

Decree reversed and appeal remanded.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

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December 23.

NINGAWA (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* BHARMAPPA AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Evidence—Evidence Act (I of 1872), Sec. 32, Cls. (2) and (3)—Deed—Recitals in deed—Description of boundary—Statement against pecuniary or proprietary interest.

The plaintiff sued in 1893 to recover possession of certain land. The defendants denied the plaintiff's title. The plaintiff tendered in evidence a registered mortgage-deed of adjacent land executed in 1877, which set forth the boundaries of the land comprised in the mortgage, and as one of such boundaries referred to the land in question as then belonging to the plaintiff. At the date of the deed there was no litigation existing between the present litigants, and at the date of the present suit the mortgagor was dead.

Held, that the statement in the deed was admissible under clause 3 of section 32 of the Evidence Act (I of 1872) as a statement against the pecuniary or proprietary interest of the mortgagor.

* Second Appeal, No. 858 of 1896.

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SECOND appeal from the decision of L. Crump, Assistant Judge of Dhárwár.

In 1893 the plaintiff brought this suit to recover possession of certain land. The defendant denied the plaintiff's title. The plaintiff tendered, as evidence of his ownership, a registered mortgage-deed relating to adjacent land executed in 1877 by one Ninga Talwar to one Govind, in which the land now in question was mentioned as one of the boundaries of the land comprised in the mortgage and was described as the property of the plaintiff. Ninga Talwar was dead at the date of this suit. It was admitted that in 1877 there was no litigation between the plaintiff and defendants, and it did not appear that there was any motive on the part of the adjacent owner (Ninga) to make this statement in the deed on the plaintiffs' behalf.

The lower Courts admitted the deed (Exhibit 70) as evidence for the plaintiff and passed a decree in his favour.

On appeal the question was, whether the statement in the mortgage-deed was rightly admitted in evidence.

Robertson, with *Narayan G. Chandvarkar*, for the appellant (defendant No. 1).

Shivram V. Bhandarkar for respondent No. 2 (one of the sons of the plaintiff, who died pending second appeal).

CANDY, J.:—An important question in this case was whether plaintiff had enjoyed long possession of the land in suit. The Subordinate Judge, after mentioning certain extracts from the village records, remarked that they were "corroborated by the recitals of boundaries in connection with a mortgage of Survey No. 94 (exhibit 70) executed by its owner, one Ninga Talwar, under a registered bond dated 1877. The disputed survey number is therein described as plaintiff's land. There was no litigation between the parties in 1877, and no motive on the part of an adjacent landowner to describe the disputed land as belonging to plaintiff."

On appeal the Assistant Judge remarked that "from exhibit 70 it appears that he (plaintiff) was in possession in 1877. This is a statement by a person who is dead, made in the course of business, and appears perfectly reliable. We now come to the

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oral evidence. Having in view the fact of plaintiff's possession in 1877, the evidence of witnesses Nos. 40, 42 and 69 appears more probable than of those for the defence."

In second appeal it is objected that the document exhibit 70 was inadmissible in evidence. It is admitted that Ninga Talwar is now dead and that he was owner of the Survey No. 94, which was bounded on the west by the field now in dispute. It is not denied that Ninga Talwar executed the original of the copy of the registered mortgage-deed, exhibit 70, and no objection was taken to the admission of the copy as such. A recital in that deed is that the land on the west is the field of Bharma Talwar, *i. e.*, the present plaintiff. The weight to be attached to such a statement cannot now be considered by us. That is solely for the Judge of the lower appellate Court to decide.

But it is contended that the document was inadmissible in evidence, and that thus the Assistant Judge was wrong in relying on it at all, and weighing the statements in it in connection with the oral evidence. If this contention is sound, then the decision of the lower appellate Court must be reversed, and the appeal remanded for the Judge to weigh again the evidence, after excluding from consideration this document, exhibit 70. If the contention is not sound, then the appeal must be dismissed.

The Assistant Judge apparently held that the mortgage bond (exhibit 70) was admissible, and the statement therein, as to plaintiff being owner of the land to the west of the field which was the subject of the mortgage, evidence under section 32 (2) of the Evidence Act, which provides that a written statement of a relevant fact made by a person who is dead, is itself a relevant fact, when the statement was made by such person *in the ordinary course of business*. The applicability of this clause entirely depends on the exact meaning of the words "course of business." The expression occurs in more than one place in the Evidence Act. Thus, in section 16, when there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact. Illustration (*a*) to that section is evidently the case of *Hetherington* v. *Kemp*[1]. The "course of business"

(1) (1815) 4 Campbell, 193.

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there put forward was a certain usage in the plaintiff's counting house. It was not a usage in a private house, which however methodical, cannot carry the same weight as the ordinary routine of an office. So too, by section 114 the Court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. What is meant by "the common course of public and private business?" Illustration (*f*), with its explanation refers to the public business of the Post Office. Private business would apparently apply to such a case as that alluded to above (*Hetherington* v. *Kemp*). If the expression was meant to include the dealings of a private individual apart from his avocation or business, different language would have been used. The explanation to illustration (*e*) of the same section (114) speaks of "a man of business," which in its well-known popular sense must mean a man habitually engaged in mercantile transactions or trade. Again, in the explanation to section 47 it is said that a person is said to be acquainted with the handwriting of another person, when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him. Here too, the expression must mean in the ordinary course of a professional avocation. The illustration is that of a broker, to whom letters are shown for the purpose of advice.

Again, by section 34 entries in books of accounts, regularly kept in the course of business, are relevant. In *Munchershaw Bezonji* v. *The New Dhurumsey Spinning and Weaving Company* (1) West, J., referred to a private account book tendered in evidence, which had been entered up casually once a week or fortnight, with none of the claims to confidence that attach to books entered up from day to day or (as in banks) from hour to hour as transactions take place. "These only" (he said) "are I, think, regularly kept in the course of business."

Having regard, then, to the above considerations there can, I think, be no doubt that the expression "in the ordinary course

(1) (1880) I. L. R., 4 Bom., 576 at p. 583.

of business" in section 32(2) must be read in the same sense. It may in one sense be true that it is, in the ordinary course of business, for a mortgage-deed to contain recitals of the boundaries of the land mortgaged. But that would not make the recitals evidence. The question is, whether the mortgage-deed itself is a statement made in the ordinary course of business. Looking at the particulars set out in clause (2) of section 32, which, though not exhaustive, may fairly be taken as indicating the nature of the statements "made in the course of business," and looking at the sense in which the expression is apparently used in other sections of the Evidence Act, it cannot be said that a mortgage-deed executed by an agriculturist falls within that term. It is not the "profession, trade or business" (to borrow the words used in section 27 of the Contract Act) of an agriculturist to execute mortgage-deeds.

I pass on to consider whether the document is admissible under clause (3) of section 32 as a statement against the pecuniary or proprietary interest of the person making it. There is good authority for answering this question in the affirmative. This is contained in the judgment of Couch, C. J., in *Rajah Leelanund Singh* v. *Mussamut Lakhputtee Thakoorain*(1). The question before the Court was whether the rent payable to the zamindár by the Ghátwal during a certain period was Rs. 75 or Rs. 175. The zamindár relied upon a statement, prepared by the then zamindár many years previously, of the Ghátwali villages in the mehal, in which there was a recital against the name of the property in question that the original rent was so much and the increased rent so much. Mr. Justice Markby held that this statement was inadmissible. He said: "I cannot bring it under any of the rules of evidence which allow a statement of a deceased person to be put in evidence. It does not appear to me to be a statement in any way detrimental to his interest: on the contrary so far as regards the rate of rent, of course, it would be his interest to state it to be as high as possible." In appeal, Couch, C. J., and Ainslie, J., said: "We cannot concur in the opinion of the learned Judge that this statement was not admissible in evidence. It is a statement by which the interest in the mehal

(1) (1874) 22 Cal. W. R., 231.

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of the person making it is reduced or affected; it is against his interest and against his proprietary right. The effect of it is to cut down the proprietary right, to subject it to the tenure or incumbrance which is mentioned. It is true that in one part of it there is what may be said to be not against his interest but in his favour namely, the amount of the original rent and increased rent payable to him. But when a document of this kind is tendered in evidence, it is not to be divided into parts, and the part which is in favour of the person making it rejected, and that which is against his interest accepted. The question is, whether, taking the document as a whole, it is against the interest of the proprietary right of the person making it. In estimating the value of any particular part of it, that may be looked at; but the principle upon which the admissibility of it is determined is whether it has been made under such circumstances as makes it reasonable to suppose that it was done *bonâ fide*, and the statements are true."

Just before this passage there is mention of the provisions of the Evidence Act. The judgment of Mr. Justice Markby was given in April, 1874, and though the evidence had been recorded in or before 1869, it appears that the admissibility of the statement in question was considered with reference to Act I of 1872 ("The Indian Evidence Act"). And even if Act II of 1855 be taken as the Evidence Act then applicable, there is no difference in the principle to be applied. Act I of 1872 made no change in the law in this respect. If, then, a statement of a zamindár, that there was a certain Ghátwali occupant in portion of his mehal, was held to be a statement against the interest of the zamindár, in the same way the statement of a registered occupant of a survey number in the Bombay Presidency that he is indebted in a certain sum of money, which is a charge on his land, must be held to be both against his pecuniary and proprietary interest. If so, then the same case quoted above is also an authority for holding that the whole statement is admissible in evidence, not only to prove so much contained in it as was adverse to the interest of the person making it, but to prove any collateral fact contained in the statement, which fact was not foreign to the part actually against interest, and formed a substantial part of

it. This was laid down in the leading case of *Higham* v. *Ridgway*[1], and though the framer of the Indian Evidence Act apparently took this case as an illustration of a statement made in the ordinary course of business (section 32 (2)), and not of a statement against interest (section 32 3)) on which ground it was decided, still the principle established by that case is in no way weakened.

I have not been able to find any Bombay case which in the least touches upon this important point; I say important, because it is evident that the admissibility of impartial statements made by third parties long before any dispute or litigation had arisen, must often turn the scale in weighing the contradictory depositions of witnesses called by the parties to the suit. Here Ninga Talwar would naturally in 1877 have known who was occupying a field next to his own field, and he would naturally express that by reciting in his own mortgage-deed that his own field was bounded on the west by the field of the man who was occupying that next field. It is an accident that this statement is admissible in evidence, because it is part of a statement which is admissible as a whole as being against the interest of Ninga. It is easy to conceive a case in which Ninga might have made the same recital in a statement not directly against his own interest, and so not admissible in evidence, though practically as impartial and trustworthy as if made in a mortgage-deed. That must be admitted; but this fact ought not to prevent the application of the law, when the case does happen to come within the four corners of the section. For these reasons I think that exhibit 70 was admissible in evidence and would confirm the decree with costs.

FULTON, J.:—The only point argued before us by the learned counsel related to the admissibility in evidence of exhibit 70. The question at issue was in reference to the nature of plaintiff's possession of certain lands, and in the course of the hearing a mortgage-deed of adjoining land was given in evidence to support his contention by showing that his name occurred in the recital of boundaries. No objection appears to have been taken to the document in the Court of first instance; and in the appellate

(1) 2 Smith's Leading Cases (Ed.), 318.

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Court the question was but lightly touched on by the Assistant Judge, who remarked that exhibit 70 was a contemporary statement who was dead, made in the course of business.

As the mortgagor was not the person or in-title of either of the parties to this suit, it must, I think, be decided that the admissibility of the document depended on whether it falls within the terms of section 32 of the Evidence Act. Mr. Shivram V. Bhandarkar, who appeared for the respondent, urged indeed that the case might be covered by section 4, but we are unable to take this view. The Assistant Judge apparently relied on clause 2 of section 32, but Mr. Robertson argued that this clause was inapplicable; and with this contention I am disposed to agree. It can hardly be said that the execution of a mortgage-deed is an act done in the ordinary course of business. Doubtless when a person has determined to mortgage his land, the insertion of the boundaries is made in the ordinary course of the business in course of transaction, but I think that in using the phrase "in the ordinary course of business" the Legislature probably intended to limit in evidence statements similar to those admitted in England as coming under the same description. The subject is dealt with in Chapter XII of Mr. Pitt Taylor's Treatise on the Law of Evidence, and the cases which he has collected show that this exception to the general rule against hearsay extends only to statements made during the course, not of any particular transaction of an exceptional kind such as the execution of a deed of mortgage, but of business or professional employment in which the declarant was ordinarily or habitually engaged. The phrase was apparently used to indicate the current routine of business which was usually followed by the person whose declaration it is sought to introduce.

While, however, considering that clause 2 of the section cannot be applied, I think there is no good ground for holding that the case does not fall within the terms of clause 3. A mortgage-deed taken as a whole is certainly a declaration against interest. In the well-known case of *Higham* v. *Ridgway* an entry in the accoucheur's book that his fee had been paid for his professional services was admitted as a statement against interest, and if the

mere acknowledgment of the receipt of a fee comes under this description, much more does an acknowledgment that a person has received money which he is bound to repay. In a mortgage-deed the mortgagor not only acknowledges his liability to repay money, but also charges his land with the debt, and, therefore, it seems that the deed as a whole is a statement against the pecuniary and proprietary interest of the person making it. The declarant would be in a better position if the deed were cancelled than he is whilst it remains in force.

But it may be urged that even assuming this argument to be correct, still it cannot be said that the recital of boundaries, which is the only part of the deed that is relevant, is a statement against interest. It was probably a matter of indifference to the mortgagor whether A or B was his neighbour. On this point no doubt some difficulty arises from the wording of the clause, but the difficulty, I think, is more apparent than real. This recital is a statement of a relevant fact and forms a material part of a statement against the interest of the declarant. If this is a correct description, I think it must be accepted as a statement against interest having regard to the context in which it is used. The real question is, was it material in the mortgage-deed, or in other words, was it used for the purpose of advancing the intention of the deed? If it was so used, then I think it was a statement against interest. The words themselves may be innocent and free from any taint of prejudice to the interests of the declarant; but the context shows that they were only employed for the purpose of more completely describing the property mortgaged and of rendering it impossible for the mortgagor, if dishonestly inclined, to raise any dispute as to its identity. The Registration Act required the mention of other properties abutting on the mortgaged land, and although such properties might perhaps have been sufficiently described without mentioning the names of their occupants it cannot be said that such mention was irrelevant or superfluous. In the cases of *Higham* v. *Ridgway* and *Rajah Leelanund Singh* v. *Mussamut Lakhputtee Thakoorain* (1) the principle was admitted that statements and entries against interest might be received as evidence of independent and collateral

(1) (1874) 22 Cal. W. R., 231.

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matters which, though forming part of the declaration, were not in themselves against the interest of the declarant. But as these cases did not come under the Evidence Act, they cannot be treated as authorities for its interpretation though they may serve as guides to indicate the probable intention. The Courts in India are now bound by the Act and must conform to its provisions, and it is of course necessary to bear this in mind when referring to decisions of the English Courts or of the Indian Courts before 1872. I think, however, that it is strictly correct to say that a statement, though indifferent in itself, becomes against the proprietary interest of the declarant when made as a material part of a deed the object of which is to limit his proprietary interest. It cannot be said not to affect his interest, because assuming it to be material, the deed, if it were struck out, would be less effective than it would otherwise be. If, on the other hand, the statements were unconnected with the purpose of the deed, and were not in themselves adverse to the declarant's interest, they would doubtless have to be rejected. *Vide Knight* v. *Marquess of Waterford* [1]; *Doe* v. *Beviss* [2].

In the circumstances, then, I think material recitals or descriptions in a deed of mortgage by a deceased mortgagor may usually be admitted in evidence of the facts stated therein under clause 3 of section 32 of the Evidence Act. It would indeed frequently be disastrous if this were not the case. Amid the conflict of the oral statements of interested witnesses a recital in an old deed made *ante litem motam* may often be a most trustworthy guide to indicate on which side lies the truth. The total rejection, then, of such statements might, in some cases, seriously interfere with the administration of justice; but at the same time it must be remembered that the Courts, while accepting them for consideration, will always have carefully to estimate their probative effect according to the circumstances in which they were made and will give them much or little weight as those circumstances may appear to require.

As this was the only point of appeal that was argued, I think the decree must be confirmed with costs.

Decree confirmed.

(1) (1840) 4 Y. and C., Ex., 283. (2) (1849) 18 L. J. (Q. P.), 128.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

VAMAN VISHNU GOKHALE (ORIGINAL DEFENDANT No. 3), APPELLANT, *v.* VASUDEV MORBHAT KALE AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS.*

1898. *January* 11.

Partition Act (IV of 1893), Sec. 4(1)—Application of section—Dwelling-house belonging to undivided family—Re-acquisition by members of such family after it has been sold to a stranger does not give any right under the section as against such stranger.

A dwelling-house belonged to four brothers, Krishnaji, Ramchandra, Vaman and Parashram, joint members of a Hindu family. In 1874 the shares of Krishnaji and Parashram were sold in execution of decrees against them, and in 1877 the remaining shares were sold, and finally the house became the property of the plaintiff and one Karandikar in equal moieties. The plaintiff sued Karandikar for partition and obtained a decree, but pending execution Karandikar conveyed his moiety back again to Ramchandra and Vaman. The brothers had continued to occupy the house notwithstanding the changes in ownership. Vaman now applied under section 4 of the Partition Act (IV of 1893) to be allowed to buy the plaintiff's moiety.

Held, that he was not entitled to the advantage given by the section. It is ownership, not occupation, that gives the right. After the sales in 1877 the house no longer belonged to an undivided family. Vaman and his brothers were then either tenants in the house or trespassers. The question was whether the dwelling-house at the time the shares therein, which had not been sold to Karandikar, were transferred to the plaintiff belonged to an undivided family. When the plaintiff purchased his moiety, he and Karandikar became the owners in common of the house, and as between them section 4 of the Partition Act had no operation. The subsequent purchase of Karandikar's interest by Ramchandra and Vaman did not confer upon them any rights which Karandikar did not possess. It was in their hands re-acquired

* Second Appeal, No. 795 of 1897.

(1) Partition Act (IV of 1893), section 4:—

(1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family, and such transferee sues for partition; the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit, and direct the sale of such share to such shareholder and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section 1, two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section 2 of the last foregoing section.

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ancestral property, but not property belonging to an undivided family within the meaning of section 4.

SECOND appeal from the decision of Ráo Báhádur M. R. Nadkarni, additional First Class Subordinate Judge of Ratnágiri with appellate powers.

The house in question originally belonged to Vishnu Bhikaji Gokhale, who died leaving four sons, viz., Krishnaji Ramchandra, Vaman and Parashram. In January, 1871, the shares of two of them, viz., Krishnaji and Parashram were sold in execution of a decree against them and were purchased by one Karandikar. In 1877 a money decree was obtained against the heirs of Vishnu, and his (Vishnu's) interest in the house was sold in execution, and after passing through several hands was finally conveyed to the present respondent (original plaintiff) Vasudev Morbhat Kale. It was decided in a former suit (see I. L. R., 10 Bom., 101) that by his purchase he became entitled to a moiety of the said house and that Karandikar was entitled to the other.

He accordingly brought this suit for partition and obtained a decree, but pending execution, Karandikar in 1892 conveyed his moiety of the house to Ramchandra and Vaman the sons of the original owner (Vishnu), and Vaman now applied under section 4 of the Partition Act (IV of 1893) to be allowed to purchase the plaintiff's share by paying him the value of it. His application was rejected. On appeal the Judge passed the following order:—

"I direct that the hearing of the application be made on the presence either of the Subordinate Judge of Rajápur on the Nazir of this Court as between the plaintiff and defendants Nos. 2 and 3 (Ramchandra and Vaman), the appellants only, and given to the highest bidder on his paying half the amount of the highest bid to the other party, the defendants Nos. 2 and 3 being at liberty to bid jointly or severally, and that if the sale be conducted by the Nazir, it should not be completed without the sanction of the Subordinate Judge."

Vaman (original defendant No. 3) preferred a second appeal.

M. B. Chaubal, for the appellant Vaman (original defendant No. 3):—We have been all along in possession of the house, although the interest of our two brothers Krishnaji and Parashram was sold in 1874. Notwithstanding the sale of their shares the family continued to be a joint family, and our subsequent

purchase from Karandikar was effected by us as members of a joint family. The object of section 4 of the Partition Act is to give ancestral property to any of the members of a joint family under certain conditions. Vaman, the appellant, has continued to be a co-sharer in the joint family and he can claim the benefit of the section, which confers a right of pre-emption upon a member of a joint family.

Narayan V. Gokhale, for the respondent (plaintiff):—Section 4 of the Partition Act does not apply here; that section applies where the joint family have remained owners of the house, but a share of it has been sold to a stranger.

FARRAN, C. J.:—The dwelling-house with regard to which the present appeal has been brought, originally belonged to Krishnaji, Ramchandra, Vaman and Parashram (since deceased), the sons of Vishnu, deceased, but liable to be sold for Vishnu's debts.

In January, 1874, the shares of Krishnaji and Parashram therein were sold in execution of a decree against them, and were purchased by one Karandikar. The house after that sale belonged to the remaining sons of Vishnu on the one side and Karandikar on the other as tenants-in-common.

In 1877 in execution of a money decree obtained against the heirs of Vishnu, his interest in the house was sold to Joglekar, who sold to Hardikar, who in turn conveyed to the present plaintiff Kale. It has now been decided that Karandikar and the plaintiff under the above sales and purchases each became entitled to a moiety of the dwelling-house. In 1892 Karandikar conveyed his moiety of the house to the above-mentioned Ramchandra and Vaman.

In execution of a partition decree made in the present suit the question arises whether under the above circumstances the defendant Vaman, the appellant before us, is entitled to take advantage of the provisions of section 4 of Act IV of 1893. It should be added that the sons of Vishnu have never actually lost the possession of the house. The latter circumstance, which Mr. Chaubal relied on, does not appear to us really to affect the question. It is the ownership of the dwelling-house and not its actual occupation which brings the provisions of section 4

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of the Partition Act into play. The family of Vishnu after the sale in 1877 were either tenants in the house or trespassers. In neither capacity would they possess any privilege of pre-emption. The quesion is, whether the dwelling-house at the time, when the shares therein which had not been sold to Karandikar were transferred to the plaintiff, belonged to an undivided family. The answer must, we think, be in the negative. The house then belonged to Karandikar and the heirs of Vishnu whose shares had not been conveyed to Karandikar. When the latter shares were transferred to the plaintiff, he and Karandikar became the owners in common of the house, and it is plain that, as between them, section 4 of the Partition Act had no operation. The subsequent purchase of the interest of Karandikar by Ramchandra and Vaman did not, in our opinion, confer upon them any rights which Karandikar did not possess. It was in their hands re-acquired ancestral property, but not property belonging to an undivided family within the meaning of section 4.

We are, therefore, of opinion that the lower appellate Court took a correct view of the case. The order which it passed was really an order under section 3, clause (2), and no exception can be taken to it except that the Court ought to have valued the house before putting it up for auction between the parties as directed by section 3. This can still be done. The provisions of section 6, clause (*) have, we think, no application to the present case. Decree confirmed with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr Justice Ranade.

BALSHET GOPALSHET SONAR (ORIGINAL DEFENDANT-OPPONENT), APPELLANT, *v.* MIRANSAHEB VALAD DADESAHEB DARUWALE, (ORIGINAL PLAINTIFF-APPLICANT), RESPONDENT.*

1898 July 5.

Partition Act (IV of 1893), Sec 3, Sub-secs. 2, 4—Suit by transferee for partition—Suit for partition by sharer against transferee—Procedure.

Section 4(1) of the Partition Act (IV of 1893) applies only where the transferee sues for partition.

Where the suit is brought by the sharer against the transferee, section 2 must be applied.

In cases where section 4 applies, the Judge should make a valuation of the share of the transferee only and direct its sale.

SECOND appeal from the decision of W. H. Crowe, District Judge of Poona.

Appeal from an order in execution proceedings.

The plaintiff brought this suit to recover his share of a house. The first two defendants were his brother and mother, and he complained that during his minority the house which had belonged to his deceased father had been sold in 1879 by them to the third defendant. He claimed to recover a half share of the house which was in the possession of the fourth defendant, to whom the third defendant had sold it.

The plaintiff obtained a decree declaring that the sale by defendants Nos. 1 and 2 was not binding upon him and that he was entitled to recover a $\frac{7}{16}$ share in the house.

* Second Appeal, No 158 of 1898.

(1) Section 4 of Act IV of 1893:—

"4 (1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

"(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

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In execution the fourth defendant applied to be permitted to buy the plaintiff's share, and it being admitted that the house could not be divided, the Subordinate Judge ordered a valuation to be made by a Commissioner, who valued the whole house at Rs. 5 and the plaintiff's share, as the property of the fourth defendant, being to the plaintiff the value of his share, viz., Rs. 1-1-1-2-0. The Subordinate Judge was of opinion that, as the fourth defendant already owned the larger portion of the house, he ought to be permitted to buy the plaintiff's share.

The plaintiff appealed and the Judge reversed the order of the Subordinate Judge. He applied section 4 of the Partition Act (IV of 1893) and ordered the house to be sold by auction and that the plaintiff should be permitted to buy the share of the fourth defendant if he chose to pay its value so ascertained.

The fourth defendant appealed to the High Court.

M. B. Chaubal, for appellant:—The Judge was wrong in holding section 4 applicable. The house was not a family dwelling-house. None but one of the plaintiff's family had lived there since 1877, in which year it was mortgaged with possession and in 1879 it was sold to the third defendant. Section 4 applies only when a transferee sues for partition, but here it is a sharer who sues the transferee. The Judge was also wrong in directing an auction. He should have valued the house.

Chidambar A. Rele for the respondent:—We are entitled to the benefit of section 4. The fourth defendant is the owner of a large share of the house. It is not possession but ownership that brings section 4 into operation *Vaman* v. *Vasudev*[1]. The fact that it is a sharer and not a transferee who is plaintiff is immaterial. The existence of a suit between them is sufficient. This is a partition suit and all the parties are on an equal footing. Each party can apply for his share whether he be a plaintiff or defendant. An auction-sale was the best mode of ascertaining the value of the house. If section 4 does not apply, the case will come under section 3, clause 2.

PARSONS, J.:—The District Judge applied section 4 of the Partition Act (IV of 1893) to this case apparently without

(1) See *supra* p. 73.

noticing that that section in its terms relates only to cases where the transferee sues for partition. The suit here was by the sharer against the transferee. He has also made a mistake in ordering that the house should be sold by auction. It is true that he has also ordered that the value of the transferee's share should be paid by plaintiff if he is willing to buy it, but in a sale by auction there is the possibility of a purchase by a third party and that is not provided for. As we construe the Act, if section 4 applied to the case and plaintiff could have and had undertaken to buy the share of the transferee, the Judge should have made a valuation of that share only and directed its sale.

In this case, however, it is not section 4, but section 2, which must be applied. Practically this makes no difference in the order that will have to be passed, since section 4 (2) directs that the procedure prescribed in section 3 (2) shall be followed in circumstances similar to those that now exist in this suit.

They are as follow:—The parties were agreed that a division of the house could not conveniently be made, and the Court at the request of the largest shareholder, the defendant, who owns $\frac{9}{16}$ of the house, directed a sale of it. When the case was before the District Court, the position was this:—Each of the parties had asked for leave to buy the share of the other at a valuation; and the Subordinate Judge had ordered a valuation of the house and had ascertained its value to be Rs. 500. All then, it appears to us, that the District Court could do under section 3 (2), if he considered that valuation incorrect and that the market value of the house should be determined by a sale by auction, was to order a sale of the shares to the shareholder who offered to pay the highest price above that valuation; in other words, the Court had to put the house up to auction between the parties at the reserved price of the valuation, and distribute the purchase-money in the proportion of the share owned by each.

We reverse the order of the District Judge and remand the case for the above procedure to be followed. Costs to be costs in the cause to be dealt with by the Judge when finally disposing of the case.

Order reversed and case remanded.

ORIGINAL CIVIL.

Before Mr. Justice Fulton, and on appeal before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Strachey.

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NAVROJI MANOCKJI WADIA (ORIGINAL DEFENDANT), APPELLANT, *v.* PEROZBAI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS), RESPONDENTS.*

Will—Parsis—Construction—Bequest of power of management to widow and daughter for life—Life estate—Gift to two persons as joint tenants or tenants in common—Intestacy—Non-claim by persons entitled to shares—Limitation.

Jehangirji Nusserwanji Wadia, a Parsi, died in 1843 leaving a widow (Manekbai) and a daughter (Motlibai) and two grandsons (sons of Motlibai) him surviving. By his will (written in the Gujaráti language) he directed that during her life his widow and daughter were "to agree together and to manage the affairs with unanimity" and after Manekbai's death he gave the whole power over his estate to his daughter Motlibai "and so long as Motlibai enjoys her natural life, everything is to remain with her." The will then continued: "After the death of Motlibai—Motlibai has two sons, namely, Bhai Navroji and Bhai Nusserwanji—these two boys are the owners of whatever property and estate there may be belonging to me. They are considered as my children. No one is to offer them any hindrance or impediment. I have presented all to my wife and to my daughter, Motlibai."

Held (confirming Fulton, J.) that Manekbai and Motlibai took only a life interest in the estate.

(2) (Varying the decree of Fulton, J.) that Motlibai's two sons took the estate as joint tenants subject to the life interests of Manekbai and Motlibai and not as tenants in common.

One Manockji Navroji Wadia died intestate in 1837, leaving a widow (Motlibai) and two sons, *viz.*, Nusserwanji and Navroji. Motlibai obtained letters of administration and until her death in 1897 remained in sole possession and enjoyment of her husband's estate, although by law entitled only to a widow's share, the two sons being entitled to the remainder. In this suit filed in 1897 by the widow of Nusserwanji, one of the sons,

Held, that the right of both sons to recover the shares to which they were originally entitled was barred by limitation (article 123 of the Limitation Act XV of 1877) and their right to such shares was extinguished under section 28 of the Limitation Act. Manockji's estate had, therefore, become merged in Motlibai's estate.

APPEAL from Fulton, J.

Suit for the construction of certain wills.

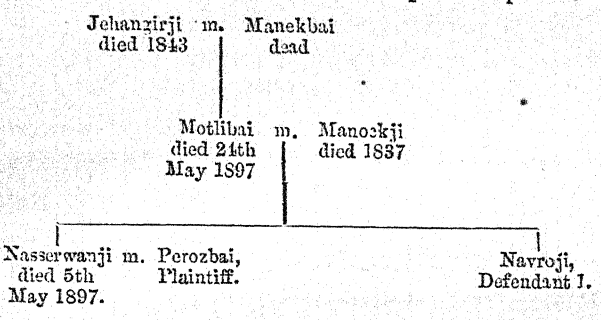
* Suit No. 611 of 1897. Appeal No. 974.

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The plaintiff Perozbai was the widow and sole executrix of Nusserwanji Jehangirji Wadia, who died without issue on the 5th May, 1897. He and the first defendant, Navroji Manockji Wadia, were brothers, the sons of one Motlibai.

The following table shows the relationship of the parties :—



Motlibai was the daughter of one Jehangirji Nusserwanji Wadia, who died in 1843, leaving a widow (Manekbai) and Motlibai, his only child. Motlibai was then already a widow, her husband (Manockji Navroji Wadia) having died in 1837 intestate, leaving Motlibai and her above mentioned two sons (Nusserwanji Jehangirji Wadia and the first defendant Navroji Manockji Wadia) him surviving.

By his will and codicil dated 1840 Jehangirji Nusserwanji Wadia left his estate to his widow Manekbai and then to Motlibai (his daughter) and then to Motlibai's two sons. Manekbai died shortly afterwards. The main questions in this suit were :—

(1) Whether under this will Manekbai and Motlibai took an absolute interest or only a life interest in the estate ?

(2) Whether under this will the two sons of Motlibai (the deceased Nusserwanji and the first defendant Navroji) took a joint interest after the death of Motlibai, or a tenancy in common ?

The clause in Jehangirji's will on which both these questions were raised was as follows :—

"So long as my wife Manekbai enjoys her natural life, the aforesaid two persons" (*i. e.*, she and Motlibai, daughter of the testator) "are to agree together and to manage the affairs with unanimity, but after the death of my wife, Manekbai, I do give the whole power over my estate and property and also over the payments and receipts to my daughter, Motlibai, and she is to

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manage all the affairs and so long as Mothibai may live to live everything is to remain under her. After the death of Mothibai Mulbai the two sons, namely, Bhai Nusserwanji Bhai Nowroji [illegible] are the owners of [illegible] and [illegible] They are constituted executrix [illegible] impediment [illegible] Mulbai.

Mothibai above mentioned was during a widow at the date of the above will. Her husband Manockji Navroji Wadia, had died in 1837 intestate. She took out letters of administration to him in 1838. Though only entitled to a widow's share of his estate (her two sons being entitled to the rest) she remained in possession of all until her death in May, 1887. In this case the lower Court accordingly held (see *post* p. 85) that the claim of her two sons to their shares had become barred by limitation under article 123 of the Limitation Act (XV of 1877), and that the whole of her husband's estate had become her property.

Nusserwanji Jehangirji Wadia (one of Mothibai's sons) died, as above mentioned, on the 5th May, 1887, without issue. He left a will, dated 8th June, 1885, whereby he appointed his widow, the plaintiff Perozbai, to be his executrix. By clauses 1 to 13 of this will he bequeathed legacies of various amounts to some of his servants, and, in addition, directed his executrix to make certain monthly payments to these legatees. In the case of each of them he directed as follows:—

'I empower my executrix [illegible] monthly [illegible] and out of the said fee [illegible] and in the event of any such payment being withheld the said [illegible] not be entitled to the same.'

And as to lapsed legacies he directed as follows:—

"16. In case all or any of the legacies hereinbefore bequeathed by the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth clauses of this my will shall lapse, or from any cause become void, I direct my said executrix to pay the amount of such lapsed or void legacies or legacy to herself absolutely."

Some of these legatees and annuitants survived the testator and some died in his life-time. In regard to all these annuitants the following questions were raised in the plaint:—

"(*a*) Whether the annuities bequeathed by clauses 1, 6, 7, 9 and 10 are dependent upon good behaviour of the annuitants, and if so who is to be the judge of their behaviour in that behalf?

"(*b*) Whether in regard to the said annuitants, all of whom survived the testator, if the bequest of annuities to them or any of such bequests fail or lapse by reason of death, bad behaviour or otherwise, and whether in regard to the bequests of annuities in clauses 5, 8, 11, 12 and 13, all of which have failed by reason of the annuitants having predeceased the testator, the plaintiff becomes entitled thereto under clause 16 of the will, or whether such lapsed annuities fall into the residue?"

The 17th clause of the will, which dealt with the residue, was as follows:—

"17 I give, devise and bequeath all the rest and residue of my estate whatsoever and wheresoever situate unto my said executrix upon trust to divide the same equally among all my sons upon their attaining twenty-one years of age, and in case I shall leave only one son, then upon trust as to the whole of the said residue for such son absolutely upon his attaining twenty-one years. And in case I shall leave no sons or such sons shall leave daughter or daughters, then upon trust as to one equal half part of the said residue for such daughter or daughters (if more than one in equal shares) for their and her respective sole and separate use upon attaining twenty one years, or marriage whichever may first happen. And as to the other one equal half part of the said residue upon trust to pay the income thereof to my said wife Perozbai during her life and after her death upon trust as to the said last mentioned one equal half part of the said residue to pay and make over the same to the persons hereinafter designated as my charitable trustees to be held by them upon the charitable trusts hereinafter declared. And I declare that in case I shall die without leaving any issue, my said executrix shall stand possessed of the said residue of my estate upon trust to pay, transfer and make over the same unto my mother Bai Motibai, Sorabji Shapurji Bengali, of Bombay Parsi inhabitant, and Jehanghir Gustadji, also of Bombay Parsi inhabitant, hereinafter called my 'charitable trustees.' And I declare that my said charitable trustees shall stand possessed of the said residue upon trust to invest the same upon any securities of, or guaranteed by, the Government of India and to apply the annual income arising from such investments in or towards the endowment of such hospitals for the sick and in donations, grants and gifts to such dispensaries, infirmaries, educational or charitable institutions situate in the Island of Bombay as in their own absolute discretion my said charitable trustees may select, and also in relieving poor and

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indigent Parsis in such manner and to such extent as my said charitable trustees may think fit, and I declare that in case the charitable trusts hereinbefore declared shall from any cause be void in whole or in part or failing effect then and in the event of my having a daughter or daughters but no son and bequeath one half of the said residue of my estate unto my said wife absolutely and in case she shall predecease me then to the trustees for the time being of the Parsi Panchayat and in the event of my dying without leaving issue or the issue male of such [illegible] my said wife Perinbai but only under the like precautions as the trustees for the time being of the Parsi Panchayat.

As to this clause the plaintiff raised the following question in the plaint —

"What are the plaintiff's rights, if any, under clause 17 of the said will in the event, (which has in fact happened,) of the said Nusserwanji Jehangirji Wadia dying without issue?"

The plaint also stated that all the trustees of the charitable trusts appointed by Nusserwanji's will were dead, and prayed that, if necessary, new trustees should be appointed and a scheme settled.

Motlibai died on the 24th May, 1897, a few days after her son Nusserwanji. She left a will dated 1896, whereby she appointed both her sons Nusserwanji and the first defendant) her executors and gave the whole of her property to them in equal shares.

The plaint prayed for a decision on the following points:—

"(1) Were the claims of the deceased Nusserwanji and his brother the first defendant Navroji, to share in the estate of their father Manekji Navroji Wadia, who died in 1837, barred by limitation?

"(2) What estate did Motlibai and her two sons respectively take under the will of Motlibai's father, Jehangirji Nusserwanji Wadia?

"(3) Were the annuities or monthly payments given by the will of Nusserwanji Jehangir Wadia to persons who were still living, dependant on their good behaviour, and, if so, who was the judge of such behaviour, and in case of lapse from death or bad behaviour, and also as to annuities given by the said will to persons who had predeceased the testator Nusserwanji, did the plaintiff become entitled thereto under clause 16, or did such payments fall into the residue?

"(4) What are the plaintiff's rights under clause 17 of the will?

"(5) Whether new trustees of the charitable bequests should be appointed and a scheme settled?

'(6) What interest did Nusserwanji take under the will of his mother Motlibai, and in case the bequest to him by the will had lapsed by reason of his dying before her, to whom did the lapsed share belong?"

The plaint further prayed that the share, if any, of the deceased Nusserwanji in the estate of (*a*) his father Manockji Navroji Wadia, (*b*) his maternal grandfather Jehangirji, and (*c*) his mother Motlibai might be ascertained and handed over to the plaintiff as his executrix.

The case was argued before Fulton, J., who gave the following judgment:—

FULTON, J.:—In this suit the Court has been asked to decide certain points as to the persons now entitled to the estate of Manockji Navroji Wadia, and certain questions of construction which arise upon the wills of Jehangir Nusserwanji Wadia, Nusserwanji Jehangirji Wadia, and Motlibai, respectively, deceased.

The facts are not disputed. Jehangir Nusserwanji Wadia was married to Manekbai. He made a will, dated 13th April, 1810, and died in April, 1813, leaving one daughter, Motlibai. Motlibai was married to Manockji Navroji Wadia, who died intestate in 1837, leaving his widow Motlibai and two sons, Navroji and Nusserwanji. Motlibai took out letters of administration. Nusserwanji died on 5th May, 1897, leaving a will. Motlibai died on 24th May, 1897, leaving a will. Navroji is still alive. Perozbai, the plaintiff, is the widow and executrix of Nusserwanji. Mr. Inverarity, on behalf of the first defendant, Navroji, pointed out that his client was not interested in the points raised in paragraphs 4 and 5 and in paragraphs (*e*) and (*f*) of the prayer of the plaint, but had no objection to their being decided in this suit, provided all costs connected therewith were paid out of Nusserwanji's estate.

The first question to be disposed of is in regard to the estate of Manockji, who died intestate in 1837, leaving a widow (Motlibai) and two sons (Nusserwanji and Navroji). The facts as stated in the plaint are not disputed, and are as follows:—"The said Motlibai obtained letters of administration in the year 1838 to the estate of her said husband, and thereafter until her death in May, 1897,

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solely possessed and enjoyed the said estate, although by law she was entitled only to a widow's share thereof, the intestate's two sons being entitled to the remainder." On the facts I must hold that the right of the sons to recover the shares to which they were originally entitled has become barred under article 123 of the Limitation Act, and their right to such shares is now extinguished under section 28. There might have been a different set of evidence had been given to show that Mothibai was holding with their consent and on their behalf, but the Advocate General said he was not in a position to give such evidence. The case has, therefore, to be decided on the allegations in the plaint, and there being nothing to show that Mothibai held on her sons' behalf, the rule of limitation must be applied. Manockji's estate, therefore, became merged in Mothibai's estate.

I come next to Jehangir's estate. The disputed clause in his will as officially translated is as follows —

"So long as my wife, Manekbai, enjoys her natural life the aforesaid two persons" (*i.e.*, she and Motlibai daughter of the testator) "are to reside together and to manage the affairs with unanimity, but after the death of my wife Manekbai, I do give the whole power over my estate and property and also over the payment and receipt to my daughter, Motlibai, and I desire to manage all the affairs and to do as Motlibai pleases in my absence, everything is to remain under her. After the death of Motlibai—Motlibai's two sons, namely Hon. Navroji and Rao Nusserwanji—the two boys are the owners of whatever property the testatrix shall then possess. They are considered minors. Never even in any hindrance or impediment they present themselves in my daughter, Motlibai."

On this somewhat obscure clause, Mr. Inverarity, on behalf of Navroji, has contended that Motlibai took an estate for life, and that her two sons took a joint estate vested in them on the death of the testator, while, on the other hand, the Advocate General, though not disputing that Motlibai's interest was a life estate and that the interests of her sons became vested in them on the death of the testator, has urged that they took as tenants in common and not as joint tenants. The difference in the result is obvious. If these sons took a joint estate, the whole passed to Navroji on the death of Nusserwanji, whereas if they were tenants in common, Nusserwanji's share passed under his will.

The question is one of considerable difficulty. It seems to me that on the authorities cited by Mr. Inverarity it is clear that if the will, as translated, had been made in England, these sons would, in the absence of any words of severance, have taken joint estates. The tendency of modern decisions undoubtedly is to give effect to any words indicating an intention to create a tenancy in common rather than a joint tenancy, but still there must be words indicative of such intention, and with the case of *Armstrong* v. *Armstrong*[1] before me it might be difficult to hold that, if this will had been made in the English language, the Court could have construed it otherwise than as creating a joint tenancy. If this question had arisen in the English will of a native testator, various considerations would have applied, and it might have been necessary to refer to the remarks of Arnould, J., in *Lakshmibai* v. *Ganpat*[2].

But I need not consider how the English will of a Pársi made before the passing of the Indian Succession Act would have been construed, for the question now is, whether I ought to apply any particular rule of construction to a vernacular will made by a Pársi in Bombay in the year 1810. The real question is, what was the intention of the testator? Now, since the decision in *Naoroji* v. *Rogers*[3], it cannot be disputed that until the legislation of 1865 "the law uniformly applied to Pársis and their property in the Island of Bombay by the Supreme Court, and, since it was closed, by the High Court at its Original Jurisdiction side has been, as correctly stated in the clear and able report of the Pársi Law Commission, the English law" subject to certain specified exceptions. The Advocate General called attention to the decision in *Mithibai* v. *Limji*[4], where in dealing with the rule in *Shelley's case* and its effect on the disposition, by Pársis, of immoveable property in the Mofussil, Sir C. Sargent said: "Even assuming English law to be the *lex loci* in the Mofussil, or that, at any rate; it must be applied in this Court in the absence of any *lex loci*, the English law so to be applied cannot include the rule in *Shelley's case*, which although said to be a rule of law and not merely of construction, was at any rate a law of property or

(1) (1869) 7 Eq., 518.
(2) (1867) 4 Bom. H. C. Rep., 150 at p. 161.
(3) (1867) 1 Bom. H. C. Rep., 1.
(4) (1881) 6 Bom., 151 at p. 163.

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tenure based upon feudal considerations, and is quite unsuited to the circumstances of this country." But I am doubtful about the applicability of this remark to the case of a Parsi's will made in Bombay not affecting immoveable property in the Mofussil; and I feel the force of Mr. Justice Scott's dictum in *Lakshmibai* v. *Hirabai*(1) "that in the expounding of wills the Court should presume that the testator did not intend to depart from the general law beyond what he explicitly declares." Consequently if it appeared that the rule (Williams on Real Property, p. 162) that "if property be given simply to A and B without further words they will at once become joint tenants" were, like the rule in *Shelley's case* as stated by Lord Herschell in the recent decision in *Van Grutten* v. *Powell*(2), a rule of law and not a mere rule of construction designed to carry out the intentions of the testator, there would be a serious difficulty in doubting that the legal effect of this testator's disposition was to create a joint tenancy. But any uncertainty as to the nature of the rule in question seems removed by the remarks of the Privy Council in *Jogeswar* v. *Ram Chand*(3), in which their Lordships spoke of it "as an extremely technical rule of English conveyancing." As such, its application to Hindu wills has been rejected both in the above case and previously in *Hiraba* v. *Lakshmibai*(4), and although the reasoning on which its applicability to Hindu wills was denied may not be equally appropriate to Parsis, it is difficult to understand on what ground a rule of construction of English words and phrases can be used for the interpretation of a will made in a different language and in a country where the people are not familiar with the English doctrine on which it is based. It cannot be disputed that where technical words are used, their legal effect must be given to them, "unless from subsequent inconsistent words it is very clear that the testator meant otherwise" (*Roddy* v. *Fitzgerald*(5) per Lord Redesdale), but it surely would be an undue extension of this rule to say that because in England a particular meaning has been assigned to a particular sequence of words, the same meaning must by analogy

(1) (1886) 11 Bom., 69 at p. 76.
(2) (1897) Ap. Ca., 662.
(3) (1896) 23 Ind. Ap. at p. 44.
(4) (1887) 11 Bom., 573.
(5) (1857) 6 H. L. C., 823 at p. 878.

be given to corresponding words in the Gujarâti language used by a testator in Bombay. By themselves, apart from technical rules of construction, the words may indicate a desire to create a joint tenancy or a tenancy in common. It was in the power of the testator to do either. But as the form of his will and the language in which it was written leaves no doubt that the phraseology which he adopted had no reference to English rules of construction it seems to me that it would be unreasonable to apply them in trying to determine his wishes. I think, then, that the only canon of construction to be followed in this case is that laid down by the Privy Council in *Soorjeemoney Dossee* v. *Denobundoo Mullick* [1]. "Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded." Well in this case it was, as above pointed out, in the power of the testator either to leave his estate to his grandsons in joint tenancy with survivorship between them, or it was in his power to leave it to them in equal shares, so that their interests should pass after their deaths in the ordinary course to their respective widows and children. The words which he used were of doubtful import, but apart from preconceived notions based on the construction of English wills about which he can have known nothing, I do not think they are more favourable to a joint tenancy than to a tenancy in common.

The question, I think, must be looked at from a layman's point of view and we must try to put ourselves in the position of this grandfather, who probably knew nothing of law and, perhaps fortunately, if my view be correct, was not subject in his use of the Gujarâti language to any legal rules of construction. He was making a will in which it is evident he desired to place his grandsons on strictly equal terms. In these circumstances is it more probable that he wished them to be joint tenants, so that the one who happened to survive the other should get the whole to the exclusion of the widow and children, if any, of the deceased brother, or is it more likely that he wished them simply to share

(1) (1857) 6 Moo. Ind. Ap., 526 at p. 550.

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his property equally, so that on the death of either the share of the one so dying should pass to those who naturally were nearest and dearest to him? The answer to this question seems clear. As pointed out by Sir C. Sargent in *Hirabai* v. *Lakshmibai* [1], the testator must surely have contemplated the probability of his grandsons leaving families of their own behind them. He cannot have intended that these families should be left unprovided for, or be dependent on the chance of a severance of interest having been effected by his grandsons during their lives. The same feelings must, in all probability, have actuated him as actuate fathers and grandfathers all the world over, who in providing for their sons and grandsons rarely, if ever, make them joint tenants. They naturally prefer a form of tenancy, which, as pointed out in Jarman on Wills in the passage quoted by Mr. Justice Scott in *Lakshmibai* v. *Hirabai* [2], "is better adapted to answer the exigencies of families than joint tenancies." The same anxiety to provide for the families of deceased sons will be found in section 5 of Act XXI of 1865 (The Pársi Succession Act), which though passed long after the date of this will shows the tendency naturally prevalent amongst Pársis. Attention was called to section 93 of the Indian Succession Act, but whatever effect this may have on the interpretation of wills made after it became law, it cannot be used as a guide in construing one made in 1810. In these circumstances I must hold that Navroji and Nusserwanji took vested interests as tenants in common, and that on Nusserwanji's death his interests passed under this will.

I now turn to Nusserwanji Jehangirji's will. As the legatees and annuitants are not parties to this suit I cannot give binding decisions between them and the executrix. The wording of the will, however, seems perfectly clear. The executrix is made sole judge of misbehaviour in the case of the legacies or annuities which are made to depend on behaviour, and if any of these legatees or annuitants referred to in paragraph (*c*) of the prayer of the plaint died during the life-time of Nusserwanji the legacies lapsed and fell under the provisions of clause 16. As to the plaintiff's duties under the 17th clause—Nusserwanji having left no issue—they are that she should make over the residue to the

(1) (1887) 11 Bom., 573 at p. 576. (2) (1886) 11 Bom., at p. 77.

trustees who will now be appointed for the charitable purposes mentioned in the will. It has not been suggested that any of the trusts are void or incapable of taking effect. In the events which have happened, plaintiff takes no beneficial interest at present in the residue of the estate of Nusserwanji. By consent of all parties, Perozbai, Navroji Manockji Wadia, Dr. Temulji Bhicaji Nariman, Cowasji Cursetji Jamsetji, and Dinshaw Sorabji Mody are, if they accept the trust, appointed trustees under the 17th clause of Nusserwanji's will in place of the deceased trustees.

In regard to Motlibai's will, it appears that as Nusserwanji predeceased his mother, the legacy to him lapsed, and as the will made no provision for a residuary legatee, his share passes as intestate property and goes in equal moieties to his widow Perozbai and to his brother Navroji. Perozbai as executrix of Nusserwanji takes no interest in Motlibai's estate.

By consent of Mr. Inverarity and Mr. Vicaji it is ordered that the costs of all parties (excepting the Advocate General) be paid out of Motlibai's estate—those of Motlibai's executors as between attorney and client—but the costs of the construction occasioned by the inclusion of questions arising under Nusserwanji's will of all parties including the Advocate General will be paid out of Nusserwanji's estate; those of Nusserwanji's executrix and of the Advocate General as between attorney and client.

Navroji (defendant No. 1) appealed and contended (1) that under the will of Jehangirji Nusserwanji Wadia, the two sons of Motlibai (*i. e.*, himself and the deceased Nusserwanji) took as joint tenants subject to the life-estate of Motlibai, and that, therefore, (Nusserwanji having died) he (defendant No. 1) was now entitled to the whole of the estate of Jehangirji Nusserwanji Wadia.

(2) In the alternative he contended that Motlibai took an absolute interest in the estate of Jehangirji.

The appeal was heard before Farran, C.J., and Strachey, J.

Macpherson and *Strangman* for appellant.

Lang (Advocate General) and *Lowndes* for respondent No. 1.

Scott and *Vicaji* for respondent No. 2.



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The following cases were cited:—*Naoroji* v. *Rogers*[1]; *Mancharsha* v. *Kamrunisa*[2]; *Soorjeemoney* v. *Denobundoo*[3]; *Mithibai* v. *Limji N. Banaji*[4]; *Surkies* v. *Prosonomoyee*[5]; Jarman on Wills (7th Ed.), pp. 1115, 1121, 1123; *Armstrong* v. *Armstrong*[6]; *Morgan* v. *Britten*[7]; *Surtees* v. *Surtees*[8]; *Lalit Mohun* v. *Chulkun Lal*[9], *Jogeswar* v. *Ram Chand*[10]; Succession Act (X of 1865), Sec. 93; Theobald on Wills (Ed., 1895), p. 328.

FARRAN, C. J.:—Two questions only have been argued before us upon this appeal. They arise upon the construction of the will of Jehangirji Nusserwanji Wadia.

The testator died so far back as 1843. The will is dated the 13th April, 1840. It was after his death proved in the late Supreme Court by his widow Manekbai and his daughter Motlibai. Mothibai was then married and has two sons, Nusserwanji (who has lately died leaving his widow, Perozbai, the plaintiff) and Navroji, the appellant, who was the principal defendant in the Court below. The testator left no other issue.

The first question is as to the interest taken by Manekbai and Mothibai, under the will, whether they took an absolute or a life interest only in the residuary estate of the testator.

Upon this question I agree with the Division Court that Manekbai and Motlibai took only a life interest in such estate. This seems to have been assumed in the Court of first instance, and no argument to the contrary would appear to have been addressed to the learned Judge in that Court. It has, however, been contended before us by counsel on behalf of the executor of Mothibai, that the estate given to her and Manekbai was an absolute estate. I set out the passages in the will upon which this contention is rested. They appear to me to have also an important bearing upon the second and more difficult question with which we have to deal. The amended translation of the introductory paragraph of the will runs thus:—

(1) (1867) 4 Bom H. C Rep, 1 at p 11
(2) (1868) 5 Bom H C. Rep, 109 (A C. J)
(3) (1857) 6 Moo Ind Ap, 526
(4) (1881) 5 Bom, 506; (1881) 6 Bom, 151.
(5) (1881), 6 Cal., 794.
(6 (1833) 7 Eq, 31[illegible].
(7) (1871) 13 Eq, 28.
(8) (1871) 12 Eq, 100.
(9) (1887) 24 Ind Ap, 85.
(10) (1896) 23 Ind. Ap, 37.

"I of my own free will and pleasure have made these two persons my heirs and vakils. The particulars thereof are as follows:—I have given in writing to my wife, Manekbai, and my daughter, Motlibai, these two persons, the entire (*i. e.*) the whole of the authority belonging to me. The above two persons, (*i e.* my) heirs and vakils, these two persons (exercising) that whole (authority) shall duly carry on all the business and affairs agreeably to what I have written (herein), and should these persons have to make inquiries or consult about the said business and affairs, then, having consulted my sister's son, Wadia Dosabhai Kharsedji, they are duly to do the same."

Although the expression "heirs" occurs in this passage, I am inclined to think that the testator did not intend thereby to give his wife and daughter any beneficial interest. Having regard to the subsequent context and provisions of the whole will, I think that by the expression "heirs" the testator meant "legal representatives." The introductory paragraph, if I am correct in that view, appoints Manekbai and Motlibai the testator's joint managers and executrices. If, however, it confers a beneficial interest upon them, that fact would not affect my conclusion. The paragraph also shows the testator's mode of conferring a joint estate; for it cannot, I think, be contended that the interest which these ladies took under it was not a joint interest.

The testator then proceeds in seven clauses to provide for the beneficial enjoyment of his estate and for legacies, though the fourth clause again reverts to a question of management. The first clause I need not read *in extenso*. It provides for two contingencies, neither of which occurred, *viz.*, for the testator having a son, and for his having a second daughter. The clause is useful as showing that when the testator desired to give an estate in common as distinguished from a joint estate, he could express his meaning in apt and appropriate language.

The second clause is the important one. It runs in the amended translation thus:—

"As long as my wife, Manekbai, is alive, the persons mentioned above shall transact business and affairs peaceably and unanimously. On the decease of my wife, Manekbai, taking place, I have given the said entire (*i. e.*) the whole authority, in respect of my wealth and estate, and claims and debts, to my daughter, Motlibai; she shall duly carry on the business and affairs. And as long as Motlibai may be alive, every thing shall remain under Motlibai's authority. And on the death of Motlibai there are Motlibai's two sons, Bhai

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Navroji Phiroze. As to them what would ordinarily devolve and [illegible] there may be [illegible] of all these [illegible] any [illegible] it to my [illegible].

It [illegible] that what passed the first which is [illegible] Motlibai [illegible] whatever [illegible] [illegible] what is [illegible] given to [illegible] given the most ample powers of management and it may be of disposition, but only for life. On the death of Motlibai all passes to her sons. At first sight it might appear that the Judges by the opening words of the clause meant only power of management. This evidently was not intended. If it was, there would be no beneficial disposition during the life-time of the ladies. To prevent this interpretation being placed upon his language the testator added the final sentence "I have given it, not for management only, but as a gift to my wife and daughter." The whole clause thus reads consistently, and effect is given to each of its provisions. Mr. Vicaji contends that the final gift overrides all the earlier provisions of the clause. It comes last, he says, and effect must be given to it alone. This is the last canon of construction to which recourse should be had. If it is reasonably possible to give effect to all the provisions of the clause, that course should, I think, be followed in preference to eliminating all the provisions except the last.

I am, therefore, of opinion that Motlibai had an interest for life only in the testator's residuary estate (as had also Manekbai jointly with her) and that the sons of Motlibai had during her life-time a vested interest in the residuary estate to come into possession on her death. Motlibai survived Manekbai for very many years, and has only recently died. Her death took place on the 24th May, 1897. Nusserwanji predeceased her by a few days, having died on the 5th May, 1897.

The second question is, whether Nusserwanji and Navroji took a joint interest under the will or an interest in common—whether they were joint owners or tenants in common of the residue,

subject to the life-interests of Manekbai and Motlibai. The English law upon this subject is summed up in Jarman on Wills in the following passages: "A devise to two or more persons simply, it has long been settled, makes the devisees joint tenants." * * * "A bequest of chattels, whether real or personal, to a plurality of persons, unaccompanied by any explanatory words, confers a joint, not a several interest, and that whether the gift be by way of trust or not, and, notwithstanding the disposition of the Courts of late years to favour tenancies in common, the same rule is now established as to money legacies and residuary bequests in opposition to some early authorities and the doubts thrown out by Lord Thurlow in *Perkins* v. *Baynton*.[1]" The passages are quoted from chapter XXXII, section I, of Mr. Jarman's work. In *Crooke* v. *De Vandes*[2] Lord Eldon says that "a simple bequest of a legacy or a residue of personal property to A and B without more is a joint tenancy". The same rule of construction is recognised by the Indian Legislature in section 93 of the Succession Act (X of 1865).

The question which we have to determine is whether it is applicable here. The will provides that upon the death of Motlibai, the owners of all these (the residue) are the sons, two persons. It is not denied that these words involve a bequest to the two sons. That is common ground. Mr. Advocate General contends that it has not been decided that a bequest to two persons in this exact language makes them joint tenants and that the Court is at liberty to treat these words as conferring a tenancy in common upon the sons. The words, however, imply a gift to the persons indicated, and in such a case the inquiry has always been "are there explanatory words which indicate that the testator intended a separate and not a joint gift." I can myself see no difference between a direct bequest to A and B and an implied bequest to the same persons arising from the use of such an elliptical phrase as the testator has employed. It would be splitting hairs to rule that a different legal result follows from the testator writing "after the death of M, I 'leave,' 'bequeath' or 'give' my house or the residue of my estate to N and N," to that which

(1) (1781) 1 Bro. C. C., p. 118.

(2) (1803) 9 Ves., 197, p. 204.

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follows from his writing "after the death of M the owners of my house or of the residue of my estate are N and N." In each case there is a bequest to N and N, without the use of words of severance. Mr. Advocate General also contends that words of severance do occur in the case of this bequest. "They are my children" are the words of severance relied upon. They are to take, it is argued, as children would take, or as in the first clause it is directed that his children shall take. I think that it is quite impossible to adopt this view. "They are my children"—"they are to me as children" is the reason assigned by the testator for making such a bequest in their favour and is not intended to indicate the nature of the interest which they are to take. The learned Judge in the Division Court appears to concede that, if this had been a will written in English, the usual rule would apply, and that the sons of Motlibai would in that case have taken as joint tenants, but that as the testator has used the Gujaráti language, different considerations apply. It is not, however, suggested that idiomatically there is any peculiarity in the Gujaráti language in this respect. I have already pointed out that when dealing with the management of the estate which is conferred upon Manekbai and Motlibai, the direction of the testator is couched in somewhat similar phraseology ("those two persons are my heirs and vakils") to that used to confer a beneficial interest upon the grandsons, and that such phraseology cannot there import a division of interest. We have, therefore, only the simple fact to deal with, that the testator has, to express his meaning, used the Gujaráti and not the English language. Does this really affect the question? I cannot think that it does. A bequest to A and B has, in my opinion, the same meaning and the same legal effect, whether it is expressed in English or in one of the vernacular languages of this Presidency. The construction cannot vary according to the particular language used by the testator. I know of no authority to support the view of the Division Court in this respect. I entirely assent to the proposition that the Court has to ascertain the intention of the testator, but this expression is sometimes apt to mislead. "The use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation that

it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, what that which he has written means. The will must be expressed in writing and that writing only is to be considered"—per Lord Wensleydale in *Abbott* v. *Middleton*[1]. This rule does not preclude the surrounding circumstances, such as the state of the testator's family and the law under which he lived, being called in aid to explain ambiguous language. "Primarily the words of the will are to be considered. They convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by the surrounding circumstances, and where this is the case, there circumstances no doubt must be regarded"—*Socrjeemoney* v. *Denobundoo*[2]. The judgment in *Gurusami* v. *Sivakami*[3] affords a useful guide upon the same subject.

Here, however, there is nothing in the surrounding circumstances which can, in my opinion, afford a guide to the interpretation of the language of the testator. He was a rich Pársi and had a wife, daughter and two grandsons. There is nothing in these circumstances to show that, in making a bequest in favour of the latter, he intended it to be a bequest in common and not a joint bequest. There is this to be said in favour of the opposite view. The grandsons were infants. The testator dwells upon that circumstance in clause 4 of the will. If it were allowable to conjecture what his wishes in that case would have been if one of the infants had died a child, one might naturally suppose that he would have wished the whole estate to pass to the survivor. For my part I think that it is probable that he would have done. Then there is to be considered the impossibility of one of the boys dying in the life-time of the testator and the different result flowing in that case from a tenancy in common and a joint tenancy. Section 93 of the Succession Act (X of 1865) does not introduce a new rule—Williams on Executors (Ed. 1893), p. 1080. The remarks of Lord Hobhouse in *Gurusami* v. *Sivakami*[4] are appropriate here. What the testator may

(1) (1858) 7 H. L. Ca., 68, at p. 114.
(2) (1857) 6 Moo. Ind. Ap., at p. 551.
(3) (1895) 22 Ind. Ap., 127.
(4) (1895) 22 Ind. Ap., at p. 128.

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have wished in one state of circumstances might be quite different from what he would have wished in another contingency. The conjecture fails. We must return to the language of the will and ascertain what it means.

Speaking in a communion I apprehend that a simple gift to A and B is a joint gift, that is to say, for the purpose of the gift they are to be treated as one person. The idea is made more clear when a gift to a class—as, for example, to the inhabitants of a parish—is assumed. If a gift is made in that form no one would, I imagine, suggest that it was a gift to each of the inhabitants of a proportionate share in the bequest. They are all considered as a unit for the purpose of accepting the gift. The Roman Jurists adopted the same view. "*Conjunctim autem legatur, veluti si quis dicat, Titio et Seio hominem Stichum do lego; disjunctim ita. Titio hominem Stichum do lego, Seio Stichum do lego.*" (Institutes of Justinian, Lib. II, Tit. XX, para. 8) [1].

The technicality in this matter, if technicality there is, consists, I think, not in construing a gift to A and B as a joint gift, for it cannot, I think, be construed otherwise, but in the rule that the heirs of a joint tenant do not inherit his interest in the subject of the joint tenancy, and that he cannot deal with such interest by will, his interest upon his death passing to his co-tenant. That, however, is a rule of law and not a canon of construction.

It has not been contended before us that Pársis in the island of Bombay are not subject to English law generally. There are certain legislative and other well-defined exceptions to the rule, but such exceptions do not include the law relating to wills, nor, so far as I am aware, the ordinary rules for their construction. The judgment in *Naoroji* v. *Rogers* [2] has set at rest any doubts which ever existed as to the law by which the Pársis are governed. I have, therefore, considered the question before us in the light of the English law being applicable to it. That law is now embodied in the Succession Act, but is virtually left unaltered by its codification.

The remarks of the Privy Council in the case of *Jogeswar* v. *Ram Chand* [3] do not appear to me to affect the question before

(1) See Sandar's Justinian (4th Ed.), p. 312. (2) (1867) 4 Bom. H. C. Rep., 1.
(3) (1896) 23 Ind. Ap., 37.

us. In that case the High Court of Calcutta held that the clause of the will they had to construe—which was in these words: "The remaining four annas' share I give to you Srimati Rani Donger Kumari and the son born of your womb Jogeshwar Narain Deo for your maintenance. Upon my death you and your sons and grandsons in due order of succession shall hold possession of the zamindári, &c. * * *. I give you the power of making alienations, sales or gifts"—created a joint tenancy in favour of the mother and son, and that each of them could at pleasure dispose of his or her interest. Their Lordships did not dissent from that view. What in my opinion they held in addition to construing the will before them was (1) that the rule of English law (which their Lordships term an extremely technical rule of English conveyancing), that a joint tenant's interest does not descend upon his heirs, is not properly applied to a bequest in joint tenancy under a Hindu will, and (2) that even under English law a conveyance or an agreement to convey his or her personal interest by one of the joint tenants operates as a severance. The case itself rather supports the view that in a will written in an Indian vernacular language, a bequest to a mother and son *simpliciter* is a joint bequest. If in a Pársi will written in Gujaráti the words used are such as to create a joint interest, it appears to me that it is impossible to escape the consequence that the beneficiaries take as joint tenants with the benefit of survivorship.

For these reasons I would vary the decree of Fulton, J., by declaring that Nusserwanji Jehangir Wadia and the defendant Navroji Manockji Wadia took a vested interest as joint tenants under the will of the said Jehangirji Nusserwanji Wadia in his estate, subject to the life estate of the said Motlibai therein.

Costs of all parties out of the estate of the testator.

STRACHEY, J.:—I agree with the judgment of the Chief Justice.

Attorneys for the plaintiff:—Messrs. *Nanu and Hormasji.*

Attorneys for the defendants:—Messrs. *Nanu and Hormasji* and *Little & Co.*

ORIGINAL CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Strachey.

1898.
August 25.

BAI PORLBAI PLAINTIFF, *v.* DEVJI MEGHJI, DEFENDANT.*

Practice—Security for costs—Infant female plaintiff—Civil Procedure Code (Act XIV of 1882) Sec. 380.

Unless in exceptional cases, neither an infant female plaintiff nor her next friend ought to be required to give security for costs.

SUMMONS adjourned into Court for argument. The plaintiff was a minor, and she sued by her next friend, Passu Devraj, to recover certain ornaments and clothes of the value of Rs. 8,775, which she alleged had been presented to her at the time of her marriage. Her husband died on the 23rd May, 1897. This suit was filed in April, 1898.

On the 20th July, 1898, the defendant took out a summons under section 380 of the Civil Procedure Code (Act XIV of 1882), calling upon the plaintiff to show cause why she or her next friend should not give security for the defendants' costs of this suit.

The summons came on before Strachey, J., in chambers, and he adjourned it into Court under Rule 22 of the High Court Rules, to be heard before two Judges. It now came on for hearing before Farran, C.J., and Strachey, J.

Macpherson for plaintiff showed cause.

Lang (Advocate General) for defendant, *contra*.

FARRAN, C.J.:—The summons in this matter has been referred to this Bench under rule 22 of the rules and orders of the High Court.

The question for consideration is whether a minor female plaintiff suing by her next friend can, and ought to be ordered to give security for costs before being allowed to proceed with the suit. It is not denied that the suit is, in substance, a suit for money. The ruling upon this point in *Degumbari* v. *Aushootosh*(a) has usually been followed in this Court.

* Suit 138 of 1898.

(a) (1890) 17 Cal., 610.

The Civil Procedure Code (Act XIV of 1882) was amended by Act VI of 1888. Section 245A, by that Act added to the Code, enacts that "the Court shall not order the arrest or imprisonment of a woman in execution of a decree for money." It has always been a principle of the law relating to security for costs that persons privileged from legal process can be called upon to give such security— *Aldborough* v. *Burton* [1]; *Goodwin* v. *Archer* [2]; Morgan and Wurtzburg on Costs, (2nd Ed.), p. 10. In accordance with that principle, when legislation exempted women from arrest and imprisonment in execution of money decrees, it provided by section 5 of the same Act that "on the application of any defendant in a suit for money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order" (*i.e.* an order for security for costs) "if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India independent of the property in suit." This provision is now added to section 380 of the Civil Procedure Code (Act XIV of 1882).

Now, in terms no exception is made, in that section, of the case of a woman who is a minor, suing by her next friend, and we cannot, we think, introduce such an exception into the section. The Code is applicable generally to all descriptions of parties, whether plaintiff or defendant, and its provisions apply as well to minors as to others. Thus a minor can be directed to file a written statement under section 112 and his suit is liable to be dismissed under section 113 if he fails to do so; and an affidavit of documents may be required of a minor defendant—*Nathmull* v. *Malharrao* [3]. Doubtless it is not intended that an infant party to a suit should personally obey such orders. It is evident from the provisions of Chapter XXXI of the Code that it is intended that his next friend or guardian should obey the orders of the Court on his behalf. Hence in construing the Code we cannot read an exception as to infants into its provisions generally, but rather a proviso that orders given to an infant may be obeyed for such infant by his next friend or guardian, nor do we think

(1) (1834) 2 Myl. and K., 401. (2) (1727) 2 P. W., 452.

(3) (1894) 19 Bom., 350.

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that we can do so when construing section 380 either as originally framed or in its amended form.

The order as to giving security for costs is, however, a discretionary one, and the question still remains whether such an order ought to be made in the case of a female infant suing by her next friend. The practice has always, so far as we are aware, been not to demand security for costs either from an infant directly or from his or her next friend *Fellows* v. *Barrett*[1]; *Hall* v. *Whitcombe*[2]; *Pennington* v. *Allen*[3] and no order as to costs is made against an infant plaintiff—Simpson on Infants (2nd Ed.), p. 485. The next friend of an infant is liable for the costs of the suit if unsuccessful—*Frank* v. *Mainwaring*[4]; Morgan and Wurtzburg, p. 352, Sec. VII, Simpson on Infants, p. 482; Civil Procedure Code (Act XIV of 1882), Sec. 140. How complete this liability is, and how far it extends, is shown by section 417 of the Code, which provides that a next friend cannot, *ipso motu*, retire from his position without giving security for the costs already incurred, unless the Court relieves him from that obligation.

If, then, the next friend of an infant plaintiff and not the infant plaintiff himself or herself is and has always been liable for the costs of the suit, a provision that a woman shall not be imprisoned for debt gives rise to no inference that the Legislature intended in any way to change the practice as to a female infant plaintiff giving security for costs. We think, therefore, that, except in exceptional cases, the old practice ought still to be observed.

The Advocate General urges that this ruling will permit of improper suits being filed by indigent persons as next friends of female infant plaintiffs. The same argument, if of weight, applies with equal cogency to the next friends of male infant plaintiffs. The answer to this appears to us to be that the Courts can be moved to stay a suit improperly brought on behalf of an infant and to remove an improper next friend of an infant and to substitute a proper person in his place. This is pointed out

(1) (1836) 1 Keen., 119.
(2) (1856) 2 Kay and J., 458.
(3) (1823) S. & S., 264.
(4) (1839) 4 Beav., 37.

in *Hind* v. *Whitmore* (*supra*). All the cases upon the subject are cited in Seton on Decrees, Part III, Ch. XXI, Sec. I. The Court can thus prevent the law from being put in motion by the next friend of an infant from malicious or improper motives. The summons will be disposed of by the Judge in chambers having regard to this judgment.

Attorneys for the plaintiff:—Messrs. *Ardesir, Hormayi and Dinsha.*

Attorneys for the defendant:—Messrs. *Little & Co.*

APPELLATE CIVIL.

Before Sir C. F Farran, Kt., Chief Justice, and Mr. Justice Candy

CHARLESWORTH (ORIGINAL PLAINTIFF), APPELLANT, *v.* MACDONALD (ORIGINAL DEFENDANT), RESPONDENT.*

1898. *January* 12.

Injunction—Contract in Zanzibar—Contract for personal service—Contract not to practise as physician—Construction—Restraint of trade—Contract Act (IX of 1872), Sec 27.

A agreed on certain terms to become assistant for three years to B, who was a physician and surgeon practising at Zanzibar. The letter (Exhibit B), which stated the terms which B offered and which (as the Court found) A accepted, contained the words "the ordinary clause against practising must be drawn up" At the end of a year a disagreement took place and A ceased to act as B's assistant and began to practise in Zanzibar on his own account. B sued for an injunction to restrain him.

Held, that B was entitled to an injunction restraining A from practising in Zanzibar on his own account during the period of three years.

APPEAL from the decision of H W. DeSausmarez, Acting Judge of the Consular Court at Zanzibar.

Suit for injunction restraining the defendant from practising as a physician and surgeon in Zanzibar.

The plaintiff was a physician and surgeon practising in Zanzibar. Being desirous of engaging an assistant, he wrote in October, 1895, to his brother, J. B. Charlesworth, in London to look for a suitable man, and subsequently to Dr. Scott to assist J. B. Charlesworth in doing so. He embodied in a document (Exhi-

* Appeal, No. 77 of 1897.

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bit B), which was not signed, the nature of the services which he required and the terms which he was prepared to offer. This document (Exhibit B) stated the qualification which he would require in his assistant and certain terms with regard to board and lodging. It also contained the following terms:—

"I am prepared to offer (1) a three-years' agreement; (2) first class passage out and home, (3) £ 200 a year pay in addition to board and lodging. Half pay during travelling.

"In the event of my going away on long leave, i. e. for more than a month or so, and my assistant being in charge, I propose to pay him additional during my absence as follows —

"1. In the event of his living in my house, being required to furnish his own board he would receive an allowance at the rate of £ 300 a year for that; putting him, of course, by that means into the position he would be in if resident outside my house, and the £ 300 a year would be for the same purposes, namely, domestic servants, food, &c., &c.

"In addition he would receive for acting 5 per cent. of the nett income during the time of acting. Nett income means after the expenses of the practice, including his own pay and board, had been deducted. This would be at the rate of at least £ 75 a year and would be guaranteed not less than £ 50 per annum. The duties as assistant are all the ordinary duties of an assistant—keeping of the books of general and of special sorts; and any assistance required in scientific work. The ordinary clause against practising must be drawn up."

On receiving this communication from the plaintiff, his brother (J. B. Charlesworth) and Dr. Scott resolved to ask Dr. Stockman, of Edinburgh, to find a man suitable for the post. Accordingly on the 13th November, 1895, J. B. Charlesworth wrote a letter to Dr. Stockman (Exhibit A), of which the following are the material portions:—

"On the other side I state the probable terms to be offered and you will notice that provision is made in the event of Frank selling his practice. The practice is now worth £ 2,500 per annum, and he has made it equal to that by his own exertions. If I may offer unprofessional suggestions, I would say the candidate should be about 30 to 33, of good experience, &c. . . . . Terms Scott has confirmed are:—

"(1) As assistant, £ 200 per annum, clear in Zanzibar, but no allowance for liquors or laundry. Passage money out and home. (2) As locum tenens £ 400 ditto. (3) To purchase practice worth £ 2,500 per annum. Terms to be arranged."

A copy of the terms as given above (Exhibit B) was also sent to Dr. Stockman.

The defendant hearing of the offered appointment had an interview in Edinburgh with Dr. Stockman, who showed him the two documents, Exhibits A and B. The defendant subsequently went to London and saw J. B. Charlesworth on the subject and at the final interview the latter asked him to write to the plaintiff. The defendant accordingly on the 10th December, 1895, wrote the following letter to the plaintiff (Exhibit C) :—

"I am sending a line or two to let you know that I have to-day accepted the post of assistant to your practice in Zanzibar. I have seen your father and brothers as also Dr. Scott, and they have all been good enough to say that they think I will suit your requirements. As regards the bacteriological work, I may mention that I am accepting your offer with reference to taking out a class on the subject in Edinburgh so as to be able to help you in that work later on as occasion occurs. At the same time I shall pay a little attention to work—genæcological work and venereal diseases—as I fancy this would be of much need in Zanzibar. Having lived for the last eight years in Edinburgh, and having held hospital appointments there, I have easy access to any work, &c., there, and could do more study there than in London, knowing more of the men here. You may expect me by the mail leaving here on the 10th February. I could hardly be ready before, having only a few days ago had the offer of your assistancy. I may mention that my present intention is to arrange with you later on about purchasing your practice (as I believe that is your wish), should of course this be suitable to us both when the time comes.

"Believe me, &c., &c.

(Signed) G. A. MACDONALD."

The defendant subsequently went to Zanzibar and took up the appointment. No formal agreement was drawn up between him and the plaintiff, but the terms of Exhibit B and Exhibit A were strictly observed. At the end of a year, however, a disagreement took place and the defendant gave up his connection with the plaintiff and began to practise on his own account at Zanzibar.

The plaintiff then filed this suit for an injunction. The defendant pleaded that he had never accepted the terms contained in Exhibit B; that that document contained terms which were merely part of a proposal which was modified by the letter (Exhibit A) and in conversation with the plaintiff's agent in England; that finally it had been arranged that he should go to Zanzibar

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without any agreement, but that one was to be drawn up after his arrival.

He further pleaded that, if there had been any agreement made by him, it had been obtained by misrepresentation.

The Judge of the Consular Court at Zanzibar found that the Exhibits B and C constituted an agreement which the defendant had broken, but he refused an injunction for the reasons stated in his judgment, as follows:—

"It is well, at the outset, to lay down the law by which this Court must be guided in determining this action, which is one purely for an injunction to prevent the defendant from practising as physician and surgeon in Zanzibar. The contract between the parties, if there be one, is of course governed by the Indian Contract Act, which contains no provisions as to orders for specific performance or injunctions. In India 'The Specific Relief Act' supplies the machinery for this, but that Act does not apply in Zanzibar, and we are thrown back on the provisions of the Order in Council, 1884, under which it has always been the practice of this Court to grant injunctions in such cases as it thought just: in doing so it has followed the practice of the English Courts. This having been the practice of this Court heretofore, I shall follow it strictly now, though I cannot help feeling that, in the rare cases in which specific relief is sought, the Indian Specific Relief Act would be a boon.

"To come now to the facts of this case." (The Judge after a review of the evidence continued.—) "I find that, in fact, the defendant came out to Zanzibar to assist the plaintiff for three years on the terms as to remuneration and payment of expenses which were offered to him in the proposal Exhibit B and accepted by him in his letter Exhibit C and by his conduct throughout..... I do not profess to have analysed the evidence thoroughly, but I have tried to give the lines on which I have arrived at my conclusion, which is that the letters B and C constitute an agreement between the parties; that the agreement still exists and that Mr. MacDonald has broken it....." (With regard to the grant of an injunction the judgment continued:—) "Would the practice of the English Courts allow this? I think not..... Let us look at the agreement. There is a sentence in the proposal which runs as follows:—'The ordinary clause of not practising must be drawn up.' I will at once say that I do not propose to interpret this clause; what it does is only to pledge the parties to come to reasonable terms about it, which has never been done; and it seems that, if such a clause had been drawn up, the contract would *pro tanto* have been void by the 27th section of the Contract Act. Save, therefore, that this clause seems to show that the defendant was not intended in all circumstances to be free to practise, I hold it inoperative. But says the plaintiff: The Court is entitled to infer, from the positive undertaking in this contract and the evidence before it, a negative undertaking on the part of the defendant, *viz.*, that he will not practise in Zanzibar

during the time of his agreement. He urges that such an undertaking would be implied by the Indian Courts, and relies, to show this, on section 57, illustration (D), of the Specific Relief Act. Now, were this the law here I should be inclined to agree with him. I think, however, that the English law is different. Certain Indian Acts, such as this and the Contract Act, are codifications of the law of England with certain differences, and it seems to be the practice of the Indian Courts to look at the settled law of England to explain any doubtful passages in those Acts. Now at the time of the passing of the Specific Relief Act, *viz.*, 1877, the case of *Montague* v. *Flockton* stood uncontradicted, and it certainly implied a negative agreement where none was expressed. So far as I can ascertain, this case goes further than any other, and it seems to me to justify the illustration in the Specific Relief Act; but, in view of the case decided by the Court of Appeal in 1891, *The Whitwood Chemical Company* v. *Hardman*, *Montague* v. *Flockton* is expressly disapproved, and the later case seems to be in direct conflict with that illustration. The decisions in the English cases point to a negative clause being essential to the right to claim an injunction, though Lindley, L.J., says that the 'principle does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this or the other, some specific thing on which you can put your finger. In this case I cannot put my finger on that specific thing; it might be practising in the town of Zanzibar, in the protectorate of Zanzibar, in East Africa, during the defendant's assistancy or after it. I feel that taken with the Contract Act this will make it difficult, in cases such as this, to obtain injunctions here, but that has nothing to do with me, for it is the law in Zanzibar, unless and until the Specific Relief Act is introduced. The plaintiff has further urged that this is a case in which the damages cannot be assessed, but the class of cases to which he refers is one where the damages suffered are sentimental, as in the case of the non-delivery of an heirloom or some famous picture or work of art for which pecuniary damages do not adequately compensate. This case is one in which damages, if claimed, could be assessed, though possibly with some difficulty. The injunction sought must, for the reasons I have given, be refused with costs."

The plaintiff appealed.

Inverarity (with *Edgelow* and *Gulabchand*), for the appellant (plaintiff).

Lowndes (with *Payne, Gilbert and Sayani*) for the respondent (defendant).

FARRAN, C. J.:—This is an appeal from the decree of the Consular Court of Zanzibar refusing with costs the plaintiff's prayer for an injunction to restrain the defendant from practising as physician and surgeon in Zanzibar in breach of an alleged agreement between him and the plaintiff prohibiting him from

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doing so. The plaintiff is himself a physician and surgeon practising there.

The issues raised in the Consular Court were:—(1) Is there any agreement between the plaintiff and the defendant? (2) If so, what are the terms of such agreement? (3) If an agreement for three years was entered into by the defendant with the plaintiff, was it obtained by the misrepresentations of the plaintiff's agent? (4) Is the plaintiff in any event entitled to an injunction?

The third of the above issues has been found in the negative, and for the plaintiff, in the Consular Court. The correctness of that finding was not seriously impugned in argument before us, and at the outset I may say that I entertain no doubt as to the soundness of the view taken upon this branch of the case by the Judge of the lower Court. I adopt his judgment upon this question and need not any further refer to it. This enables me to state the evidence in a more succinct manner than I could have done had I to consider it in detail in reference to the charge of misrepresentation.

The appellant is not satisfied with the finding of the Consular Court as to the terms of the agreement which that Court considers was entered into, while the respondent contends that there was no completed agreement between the parties. I deal with these questions of fact raised by the first and second issues before considering the question of law which the fourth issue gives rise to.

The plaintiff for some years before 1895 had been practising with success as a physician and surgeon in Zanzibar. In October of that year he was desirous of engaging an assistant. He wrote to his brother, J. B. Charlesworth, to be prepared to look out for a suitable man; and subsequently to Dr. Scott to assist J. B. Charlesworth in doing so. The nature of the services which the plaintiff required, and the terms which he was prepared to offer, he embodied in a document (Exhibit B) which is headed "Zanzibar, E. Africa", but is not signed. This he sent to J. B. Charlesworth or to Dr. Scott—it does not appear to which. These gentlemen consulted together in London and resolved to ask Dr Stockman of Edinburgh to look round for a suitable doctor. In pursuance of this resolve the plaintiff's brother on the 13th Nov-

ember, 1895, wrote a letter (Exhibit A) to Dr Stockman to which he appended "terms Scott has confirmed." The memo. (Exhibit B) was then or subsequently also sent to Dr. Stockman. The defendant, who was at this time in an assistancy in Edinburgh, heard of the offered appointment from a Dr. Orr. He saw Dr. Stockman upon the subject. This is the account which the defendant gives of the interview. "He" (Dr. Stockman) "told me that he had been asked to get a man to go to Zanzibar and he said I could see the particulars in the letters he showed me. They were Exhibit B and Exhibit A."

This was, he says, on the 6th December, 1895. The defendant on the next day told Dr Stockman that he would like further details. He then went to London, where he saw J. B. Charlesworth and Dr. Scott, and had lengthy conversations with them about the practice and the desirability of his going to Zanzibar, but I cannot find a suggestion that at any of these interviews any alteration or variation was made or suggested in the proposals contained in Exhibits B and A originally submitted for his consideration. At the final interview which he had with J. B. Charlesworth, the latter asked him to write to the plaintiff. The defendant then wrote a letter (Exhibit C), dated 10th December, 1895, which J. B. Charlesworth approved and which was then posted to the plaintiff.

It appears to me that this letter contains an unconditional acceptance by the defendant of the offer made to him in Exhibit B and Exhibit A, and that Exhibits B and A and C contain a binding agreement come to between the defendant and the plaintiff from which neither party was thenceforth at liberty to recede. This is the conclusion which the Consulate Court has arrived at, and I entirely agree with it. The only consideration which militates against that conclusion is a remark which the defendant states that he made to J. B. Charlesworth at their final interview when a reference was (he says) made as to having an agreement drawn up. J. B. Charlesworth said that it had better be drawn up at Zanzibar, to which the defendant (he says) replied that "this will suit me much better, as I can go out and see this place and people and every thing."

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It was subsequently to this that the defendant wrote and signed Exhibit (*supra* p. 105) C at the request of J. B. Charlesworth. Assuming, as it is uncontradicted, that the defendant made the above remark, it appears to me to be quite inconsistent with the letter which he wrote to the plaintiff with reference to the plaintiff's proposal, which letter, as I have said, amounts, in my opinion, to an unconditional acceptance of it. There is no proposal in either Exhibit B or Exhibit A that the defendant should go to Zanzibar and see the place and people at the defendant's expense and have half his salary paid on the way. The proposal is that he shall go out upon these terms as an assistant to the plaintiff for three years. I, therefore, think that the defendant's alleged remark may be disregarded.

It is stated by the defendant that it was proposed to have a written agreement drawn up when he got to Zanzibar. This may have been so, but that circumstance does not appear to me to prevent the defendant's written acceptance of a written proposal constituting a completed agreement. The subsequent written agreement would only be a reduction into formal language of the terms which had been previously agreed upon between the parties. Lastly, Mr. Lowndes contends that Exhibit C is not an acceptance of the plaintiff's offer, but an acceptance of the post which the plaintiff had offered to him. The words are: "I am sending a line or two to let you know that I have to-day accepted the post of assistant to your practice in Zanzibar." That acceptance of the post to my mind is as complete an acceptance of the terms upon which the post was offered as would have been an acceptance in words of the terms themselves. The acceptance of the one necessarily involves the acceptance of the other. This is the construction which the plaintiff would naturally put upon the letter of the defendant, and in my opinion it is not really susceptible of any other.

There is not, I think, any contract contained in Exhibits B, A and C, that the plaintiff shall sell his practice to the defendant. The hope or expectation of being able to purchase the business was no doubt held out to the defendant, but upon that subject there was no contract. The terms of Exhibit C, in which the defendant accepts the post of assistant, place that matter beyond doubt.

After accepting the plaintiff's offer of his assistancy the defendant adds: "I may mention that my present intention is to arrange with you later on about purchasing your practice (as I believe that is your wish) should, of course, this be suitable to us both when the time comes." To prevent the defendant from expecting anything definite with reference to the purchase, the plaintiff wrote the letter Exhibit D to the defendant. The defendant received this at Marseilles and did not on his arrival or for nearly a year afterwards, when the rupture occurred, refer to the question of purchase.

No formal agreement was drawn up on the arrival of the defendant in Zanzibar. It is difficult to see how the terms of the defendant's engagement could be more precisely defined than they are in Exhibits A and B, except in regard to the defendant not practising on his own account. These terms were observed to the letter on both sides until the rupture occurred. The term contained in Exhibit B with reference to the defendant's practising on his own account is this: "The ordinary clause against practising must be drawn up." I do not see why this term of the contract is not, like its other terms, a term to which the defendant agreed. I am of opinion that when he signed Exhibit C, he agreed to it. The effect of that is, in my opinion, to give the plaintiff the right to call upon the defendant to execute the ordinary covenant against practising as a physician and surgeon in Zanzibar. The parties were contracting with reference to Zanzibar and their intention as gathered from the context of the contract must, I conceive, necessarily have been to confine the operation of the agreement to that place. As to the limit of the covenant in point of time, the law as contained in the Contract Act, section 27, renders such a covenant void in so far as it extends beyond the period of the agreement. This is clear from the decided cases. Most of them will be found collected in *Haribhai* v *Sharafalli* [1]. The parties must, I think, be taken to have contracted with reference to the law prevailing upon this subject in Zanzibar. If that be so, the result is that the defendant has, in effect, agreed not to practise as a physician and surgeon on his own account in Zanzibar during the term of his agreement and during the same

[1] (1897) 22 Bom., 861.

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term to practise there as the assistant of the plaintiff. If this is the meaning and effect of the agreement, as I think it is, there is nothing vague or indefinite about it and there can be no objection to it on that ground. It does not in the least resemble the agreement in *Davies* v. *Davies* (1), which on the ground of vagueness and uncertainty was held to be unenforceable.

Being then of opinion that the parties here came to a binding contract, and that it included the above agreement against the defendant's practising on his own account in Zanzibar, I pass to consider whether that agreement is void under the Contract Act or is an enforceable agreement. In other words, is it an agreement which restrains the defendant from exercising his lawful profession? Is it an agreement in restraint of trade? I think not. I do not think that an agreement of this class falls within the section. If it did, all agreements for personal service for a fixed period would be void. An agreement to serve exclusively for a week, a day, or even for an hour, necessarily prevents the person so agreeing to serve from exercising his calling during that period for any one else than the person with whom he so agrees. It can hardly be contended that such an agreement is void. In truth, a man who agrees to exercise his calling for a particular wage and for a certain period agrees to exercise his calling, and such an agreement does not restrain him from doing so. To hold otherwise would, I think, be a contradiction in terms. The authorities appear to me to support this view. The case of *Mackenzie* v. *Sriramiah* (2) is directly in point as a decision, and in *Carlisles Nephews and Co.* v. *Ricknauth* (3) the same view is taken. There is also the dictum of Candy, J., in *Callianji* v. *Narsi Tricum* (4), and illustration (*d*) to section 57 of the Specific Relief Act is what I may call a legislative decision to the same effect.

The next question which arises is whether the Consular Court of Zanzibar ought not to have granted an injunction in the case. Upon that question I think that we must accept with deference the law laid down in *Whitwood Chemical Co.* v. *Hardman* (5) as the law applicable in Zanzibar, but the facts of the present case are

(1) (1887) 36 Ch. Div., 359.
(2) (1890) 13 Mad., 472.
(3) (1886) 8 Cal., 809.
(4) (1894) 18 Bom., 702.
(5) (1891) 2 Ch., 416.

different. Here there is, as there there was not, a negative clause in the agreement, and the learned Judges all recognized the law in England to be that if the parties express by negative words their intention that the employé is not at liberty to carry on business on his own account during the term of his engagement the Court will enforce that agreement by injunction. They recognized *Lumley* v. *Wagner* (1) as binding law. I will only say with reference to the remarks made by the Lord Justices as to the propriety of extending the law of injunction to contracts of personal service which contain a negative covenant that the Indian Legislature has adopted that extension, and though the Specific Relief Act is not law in Zanzibar, this shows that the law laid down in *Lumley* v. *Wagner* is not considered by the Legislature to be inappropriate in the East. In my opinion it would be most unfair to gentlemen in the position of the plaintiff not to protect them in such cases. It would virtually debar them from engaging an assistant at all. An action for damages would afford them no protection, certainly no adequate protection. Lastly it was urged by Mr. Lowndes that the circumstances which led the defendant to throw up his assistantship and to start as the plaintiff's competitor for the medical business of Zanzibar were such as to justify the Court exercising its discretion not to grant an injunction, though they may not protect the defendant from an action for damages. The defendant admittedly wilfully refused to continue to perform the duties of an assistant and purported to throw up his appointment. As to this contention no defence on this ground was suggested in the pleadings and no issue was raised in the lower Court, and the evidence was not directed to the point. I am of opinion that it cannot now be raised here. I refrain from offering any opinion upon the moral justification upon which the defendant relies, and will only say that, so far as I can judge from the proceedings before me, the plaintiff is morally as well as legally entitled to the protection which he asks the Court to grant him.

I would, therefore, allow the appeal and grant an injunction restraining the defendant from practising as a physician and

(1) (1852) 1 D. M. G., 604.

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surgeon in Zanzibar during the period of his engagement, and direct that he pay the plaintiff's costs of suit and appeal.

CANDY, J.:—I have had the advantage of reading the judgment written by the Chief Justice, and as I agree with the conclusions arrived at by him, I need not enter into details, but will merely indicate generally some of the reasons which led me to those conclusions.

The learned counsel for defendant supported the decree of the lower Court, dismissing the plaintiff's claim, on the ground that there was no concluded agreement between the parties. There is more than one answer to that contention. Not the least forcible is the consideration that it would be contrary to the common course of human conduct and private business to suppose that plaintiff would pay £20 for defendant going through a course of bacteriology in Edinburgh, and would pay the costs of defendant's passage to Zanzibar, the consideration thereof being merely that defendant should come out to Zanzibar, and look round and see how he liked the place, and then if it suited him enter into an agreement to become plaintiff's assistant. Defendant's contention, in short, is that it was open to him, having reaped all these advantages, to say to plaintiff after an indefinite time, "I have received all this from you, and I have drawn my salary (£ 200 per annum) as your assistant, and lived at your expense: now that I have looked round and liked the place, I am entitled to leave you and to set up a rival practice." It seems to me sufficient to state this contention thus plainly to show that it cannot have any weight with the Court.

It was contended that at any rate there were certain terms in the contract which were purposely left open in England, and were to be settled when the agreement was concluded in Zanzibar, *i.e.* (*a*) the period of the agreement; (*b*) the terms for purchase; (*c*) the clause about not practising. The answer to that is the memorandum B, which admittedly contains the proposal emanating from plaintiff, the very first item of which is "a three-years' agreement." There is not a suggestion in the evidence or in the arguments before the lower Court that there was any discussion in England as to the period

of engagement being anything else than three years. In the letter from Dr. Scott to Dr. Stockman (A), it is true that the expression "probable terms to be offered" is used; but it is admitted that this letter must be read with the memorandum (B). The letter proceeds "Terms Scott has confirmed are," and the first deals with the pay which the assistant should have: there is no mention of the period. That is explicitly stated in the memorandum (B). When then defendant wrote (C) saying "I have to day accepted the post of assistant to your practice in Zanzibar," he must be taken to have accepted the terms of a three-years' engagement.

As to the terms of purchase it is abundantly clear from defendant's own admissions in his deposition that no definite agreement to purchase formed a term of the contract. No doubt the probability of purchase, "should of course this be suitable to us both when the time comes," (as defendant himself wrote in C), was an inducement to defendant to accept the post; but this is the utmost that can be said. Not only did defendant remain silent for many months after his arrival at Zanzibar, but he never wrote to Messrs. J. B. Charlesworth, Scott, or Stockman, pointing out that the principal ground of his engagement, or at least of his proceeding to Zanzibar, was found by him to be non-existent. His counsel before us pointed to the fact that no attempt had been made by plaintiff to obtain the evidence of the above named gentlemen on commission, or to put in their letters, and he referred to Exhibits M and N. But these are notices from defendant's solicitor calling for the letter and telegram from J. B. Charlesworth to plaintiff of 11th December, 1895. It was for defendant to put these in, if they were admissible, and it was certainly for defendant, and not plaintiff, to obtain the evidence of the above-mentioned gentlemen, since it was he who contended that his interviews with them would show that there was no concluded contract. Plaintiff took his stand on the written proposal and acceptance; and in the absence of any corroborative evidence to the contrary, defendant's contention that these do not constitute a contract is worthless.

As to the clause about not practising, defendant's counsel drew our attention to the fact that there is no suggestion in the cross-

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examination of defendant that anything was said in England about this clause. The obvious answer to that is that the clause was evidently taken as a matter of course. Defendant himself admitted in his deposition that if he was engaging an assistant, he would have such a clause in his agreement. The learned counsel for defendant invited us to draw no inferences from defendant's conduct after his arrival in Zanzibar, and he pointed to the correspondence P. G. H. as showing that defendant's allegations must be true as to the terms on which he came out from England. But this correspondence took place in January, 1897. By that time the parties were at arms length; and defendant was then forced to put forward some excuse for his conduct the excuse which he shortly afterwards attempted to substantiate in Court.

As to what "the ordinary clause against practising" is, it is true that there is no evidence. But in my opinion it must be taken at least to be a contract not to practise at Zanzibar in competition with the employer during the period of the engagement. That certainly is not void for vagueness or indefiniteness. In *Davies* v. *Davies* (1), to which the learned counsel referred, the covenant which the Court of appeal held was too vague to enforce, was "to retire from the partnership, and *so far as the law allows* from the business, and not to trade, act, or deal in any way so as directly or indirectly to affect the continuing partners." As to whether this particular term in the contract in the present case is void under section 27 of the Contract Act, I see no reason to recede from the position which I took in *Ca lianji Harjivan* v. *Narsi Trikam* (2). I still agree with the remarks of the Calcutta High Court in *The Brahmaputra Tea Co.* v. *Scarth* (3); "an agreement to serve a person exclusively for a definite term is a lawful agreement, and it is difficult to see how that can be unlawful which is essential to its fulfilment, and to the due protection of the interests of the employer, while the agreement is in force." The Specific Relief Act may not be in force in Zanzibar; but the intention of the Indian Legislature may well be inferred from its terms. As I put it to the learned counsel

(1) (1887) 36 Ch. D., 359.
(2) (1894) 18 Bom., 702, at p. 708.
(3) (1885) 11 Cal., 545 at p. 550.

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for the defendant in the argument at the bar, section 57 of the Indian Specific Relief Act, passed in 1877, evidently contemplates a valid agreement, express or implied, on the part of a servant not to serve any one else during the period of engagement of service. The service may be in a lawful profession, trade or business of any kind. Are we then to assume that to that extent the provisions of section 27 of the Contract Act are impliedly repealed? I feel quite unable to answer that question in the affirmative. On the contrary I hold that, when B contracts with A to serve him for three years as assistant in his profession as physician and surgeon at a certain place, and at the same time there is the ordinary clause against practising (presumably at that place during the period of engagement), there is a valid agreement in furtherance, and not in restraint, of the exercise of a profession.

There remains the question whether, according to the principles followed by the Courts in England (apart from the provisions of the Specific Relief Act which is not in force in Zanzibar), plaintiff is entitled to an injunction restraining defendant from practising as physician and surgeon in Zanzibar during the period (three years) of defendant's engagement. The Judge of the lower Court thought that plaintiff was not so entitled, on the authority of *Whitwood Chemical Co.* v. *Hardman* [1], holding that the term in the agreement—"the ordinary clause of not practising must be drawn up"—was not a specific negative covenant on which he could put his finger. He said: "I do not propose to interpret this clause: what it does is only to pledge the parties to come to reasonable terms about it, which has never been done. * * * * It might be practising in the town of Zanzibar, in the protectorate of Zanzibar, in East Africa, during the defendant's assistancy or after it." I am unable to agree with the above remarks. It seems to me that the words constitute an express negative covenant not to set up a rival practice during the period of the engagement in the place where defendant was to practise as plaintiff's assistant. I do not interpret the words as meaning that the parties were to subsequently come to terms as to the exact extent or limit of such a clause. There is not a

(1) (1891) 2 Ch, 416.

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word in the evidence pointing to that conclusion. Defendant admittedly made no enquiries on the point in England. It was probably the intention of defendant, if not of both the parties, that all the terms of the proposal and acceptance including the ordinary clause of not practising, which constituted the contract, should on defendant's arrival at Zanzibar be drawn up in a formal agreement. But the omission to do this did not make the contract less binding.

If, then, we hold that there was in this case an actual negative clause, if we can say that the parties were contracting in the sense that one should not do this or the other - some specific thing on which we can put our finger—then the authority of *Whitwood Chemical Co.* v. *Hardman* fails, and there is no reason why we should not follow the principle laid down in *Lumley* v. *Wagner*[1].

This is not a case in which we are asked to indirectly decree specific performance of the contract of personal service. Considering the relations between the parties it is evident that plaintiff does not wish to compel defendant to serve as his assistant for the remaining portion of the three years. Except Zanzibar the whole world is free to defendant to practise his profession. I see no reason, therefore, on that ground why the injunction should not issue. The principle is well settled that in granting or withholding an injunction, the Courts exercise a judicial discretion, and weigh the amount of substantial mischief done or threatened to the plaintiff and compare it with that which the injunction, if granted, would inflict upon the defendant. The doctrine is very clearly explained in *Doherty* v. *Allman* [2]. See the remarks of Wilson, J., in *The Shamnuggur Jute Factory Co.* v. *Ram Narain*[3].

In the present case the learned counsel for defendant urged us in the exercise of our discretion not to grant an injunction because the plaintiff's conduct had been such as to disentitle him to that form of relief. But there is no evidence that the plaintiff has behaved badly towards the defendant. On the contrary his conduct appears to have been perfectly honourable. There was mention in the evidence of a Court of enquiry demanded by

(1) (1852) 1 DeG. M. and G., 604. (2) (1878) 3 A. C., 709.
(3) (1886) 14 Cal., 189 at pp. 199 and 200.

the plaintiff in regard to imputations on his conduct towards other persons, but nothing tangible was established or even put forward against the plaintiff. Under these circumstances I see no reason why the plaintiff should not obtain the only relief which would really be of any use to him.

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Injunction granted.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr Justice Candy.

HUSEIN AND OTHERS (ORIGINAL DEFENDANTS NOS. 4, 5 AND 6), APPELLANTS, *v.* SHANKARGIRI GURU SHAMBHUGIRI AND OTHERS (ORIGINAL PLAINTIFFS NOS. 1—3 AND DEFENDANTS NOS. 1—3, 7 AND 8), RESPONDENTS *

1898. *February* 10.

Mortgage—Money decree obtained by mortgagee—Execution—Sale of mortgaged property in execution—Purchaser at such sale—Title of such purchaser—Transfer of Property Act (IV of 1882), *Sec.* 99.

Previous to the passing of the Transfer of Property Act (IV of 1882) a mortgagee obtained a money-decree against his mortgagor and in execution sold the mortgaged property. The son of the mortgagee bought it at the sale.

Held, that by his purchase at the execution-sale the son took an absolute title and was not liable subsequently to be redeemed at the suit of the heirs of the mortgagor.

Martand v. *Dhondo* [1] distinguished.

Semble.—A third person purchasing mortgaged property *bonâ fide* at a sale in execution of a money decree obtained by the mortgagee against the mortgagor obtains a good title free from the mortgage lien, unless the sale is made subject to it.

APPEAL from a remand order passed by E. M. Pratt, District Judge of Sholápur-Bijápur.

Suit for redemption. The plaintiffs' father (Shankargiri) on the 23rd July, 1873, mortgaged the property in question to Nurudin, the father of defendants Nos. 1, 2, 3, 7 and 8 and grandfather of defendants Nos. 4, 5 and 6, who were the children of Pirshah, a deceased son of Nurudin.

Defendants Nos. 1, 4, 5 and 6 denied the plaintiffs' right to redeem. They pleaded that the mortgaged property had been sold

*Appeal, No. 38 of 1897 from order.

(1) (1897) 22 Bom., 671.

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in 1878 in execution of a money decree obtained by Nurudin (the mortgagee) against Shankargiri (the mortgagor), and that Pirshah, the son of Nurudin (the mortgagee), had purchased it; that the sale had been duly confirmed and Pirshah had got possession, and on his death his children (defendants Nos. 4, 5 and 6) had succeeded as his heirs. They contended that by the sale the mortgage was extinguished and the right of redemption gone.

The Subordinate Judge of Bársi dismissed the suit, holding that the mortgage had been extinguished by the sale under the money decree obtained by the mortgagee.

On appeal by the plaintiffs the Judge reversed the decree. He held that under the provisions of the Transfer of Property Act (IV of 1882), section 99, the sale in 1878 was void, and he remanded the case for a finding as to what balance was due by them on taking account under the mortgage.

The Transfer of Property Act (IV of 1882) came into force on the 1st July, 1882, and was extended to Bombay in January, 1893. Section 99 of that Act is as follows:—

"99. Where a mortgagee in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not attaches the mortgaged property he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, &c., &c."

Defendants Nos 4, 5 and 6 preferred a second appeal.

Dattatraya A. Idgunji, for the appellants (defendants Nos. 4, 5 and 6):—The sale was valid and the right of redemption was extinguished. The Transfer of Property Act does not apply. The sale in question was in 1878 and the Act was not passed until 1882 and was not applied to this Presidency until 1893. It is not retrospective: see section 2; *Ambabai* v *Bhau bin Rajaram* (1). The Judge has relied on *Durgayya* v. *Anantha* (2), but that decision is not applicable. It has been found as a fact that Pirshah did not purchase *benami*, nor was there any fraud or collusion in the transaction. Pirshah obtained an absolute title by his purchase and has been in possession ever since—*Bhuggobutty Dossee* v. *Shamachurn Bose* (3).

There was no appearance for the respondents.

(1) P. J., 1895, p. 291. (2) (1890) 14 Mad., 74.
(3) (1876) 1 Cal., 337.

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FARRAN, C. J.:—The District Judge was, we think, in error in applying the provisions of section 99 of the Transfer of Property Act to the solution of the appeal before him. The sale in execution at which Pirshah purchased, took place in 1878 long before the Transfer of Property Act came into operation in this Presidency—before it was even passed. The Act is not retrospective. Section 2 provides that "nothing herein contained shall be deemed to affect" * * "(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability." In *Durgayya* v. *Anantha* [1], relied upon by the District Judge, the sale was after the Transfer of Property Act came into force in Madras.

In this case the original mortgagee Nurudin having obtained a money decree against his mortgagor put up the mortgaged premises for sale. They were purchased by Pirshah and it is expressly found that the latter did not purchase *benami* for Nurudin. This distinguishes the present case from *Martand* v. *Dhondo*[2], where the mortgagee himself purchased in the names of his servants and dependents at an undervalue and without the leave of the Court. That was the *ratio decidendi* there. It went as far as it was possible to go, and the principle deducible from it cannot be extended to the case of a third person purchasing *bonâ fide* at an execution sale held by the mortgagee. Such a sale confers a good title upon the purchaser, and that too we are inclined to think free from the mortgage lien, unless the sale is made subject to it—*Bhuggobutty Dossee* v. *Shamachurn Bose* [3]—but that question does not arise here.

Pirshah, therefore, obtained an absolute title to the property and is not liable to be redeemed at the suit of the plaintiffs, who represent the original mortgagor. The Subordinate Judge was, therefore, right in dismissing the suit when he found that Pirshah did not purchase *benami* for Nurudin, and the District Judge having agreed in that view ought not to have remanded the case.

Remand order reversed and decree of the Subordinate Judge restored with costs throughout on the plaintiffs.

Remand order reversed.

(1) (1890) 14 Mad., 74. (2) (1897) 22 Bom., 624.
(3) (1876) 1 Ca'c., 337.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898. *February* 21.

APPAYA AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* PADAPPA (ORIGINAL PLAINTIFF), RESPONDENT.*

Jurisdiction—Jurisdiction of Civil Courts—Caste question—Excommunication—Court's power to inquire into the validity of the order of excommunication—Burden of proof.

The plaintiff, who was *a pujári* of a Jain temple, sued for an injunction to restrain the defendants from entering the temple and worshipping the idol, on the ground of their excommunication by the Swámi for misconduct. Defendants pleaded that they had been guilty of no offence for which a sentence of excommunication could properly be passed, and that the inquiry into their conduct was held by the Swámi *ex parte* and without any notice being given to them.

Held, that the Civil Court had jurisdiction to inquire into the validity of the sentence of excommunication, and that it lay on the plaintiff, who sought to enforce the sentence and by virtue of it to deprive the defendants of their civil rights, to prove that it was passed on justifiable grounds and after a fair and proper inquiry.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum.

The plaintiff and defendants were *bhándbands* belonging to two different branches of a family of *pujáris*, or officiating priests, of a Jain temple at Gavan in the Belgaum District.

There were certain lands set apart for the remuneration of the *pujáris*, which were in the possession and enjoyment of the defendants.

The plaintiff alleged that the Jain Swámi, who managed the affairs of the temple, had excommunicated the defendants for misconduct, and had appointed the plaintiff as the *pujári* of the temple. The plaintiff, therefore, brought this suit, praying for an injunction restraining the defendants from entering the temple and from touching and worshipping the idol, on the ground of their excommunication.

Defendants pleaded (*inter alia*) that they had been excommunicated without sufficient reason, and that the inquiry into their

* Second Appeal, No. 895 of 1897.

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conduct was held by the Swámi *ex parte* and without any notice being given to them. They also pleaded that the suit was not cognizable by the Civil Court, as it involved a caste question.

The Subordinate Judge held that the Court had jurisdiction to entertain the suit, that the sentence of excommunication was justifiable, and that the defendants had in consequence forfeited their right to the office of *pujári*. He, therefore, granted the injunction sought, and ordered the injunction to remain in force until the defendants were re-admitted to their caste.

This decision was confirmed, on appeal, by the District Judge, who was of opinion that the Civil Court had no power to inquire into the validity of the order of excommunication, though the evidence in the present case did not disclose any very definite ground for the excommunication.

The defendants preferred a second appeal to the High Court.

Setlur (with *M. V. Bhat*), for appellants (defendants):—We contend that the Court had no jurisdiction to take cognizance of this suit. The suit is brought to enforce the excommunication passed by the Swámi. The object of the suit is to give a legal sanction to the excommunication, and prevent the defendants from exercising their religious functions. The suit thus involves a caste question, and, as such, will not lie in a Civil Court. Section 21 of Regulation II of 1827 ousts the jurisdiction of the Civil Court over such a suit—*Shankara* v. *Hanma*[1]. But, if the Court has jurisdiction to take cognizance of such a suit, then we contend that the Court is bound to inquire into the validity of the excommunication. The Court will not give effect to that order unless it is satisfied that it is passed on justifiable grounds. The lower Court was wrong in holding that the legality of the order cannot be inquired into by the Civil Court. The sentence of excommunication in this case was passed *ex parte* and without giving us any opportunity of proving our innocence of the offence charged. We were condemned unheard. Under these circumstances the excommunication is absolutely invalid and will not be enforced in a Court of justice—*Vallabha* v. *Madusudanan*[2];

(1) (1877) 2 Bom., 470.

(2) (1889) 12 Mad., 495.

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Venkatachalapati v. *Subbarayudu* [1]; *Krishnasami* v. *Virasami* [2]; *Jagannath Churn* v. *Akali Dassia* [3]; *Advocate General of Bombay* v. *Jivid Haim* [4]; *Pragji* v. *Govind* [5]; *Ganapati* v. *Bharati* [6]; *Queen* v. *Sankara* [7].

H. C. Cojaji, for respondent (plaintiff):—The jurisdiction of the Civil Court is not ousted merely because the suit involves a caste question. The object of the present suit is not to interfere with the autonomy of a caste, but to give effect to the decision of the caste as promulgated by the Swámi, who is the spiritual head of the caste. Regulation II of 1827 does not debar the Court from taking cognizance of such a suit—*Pragji* v. *Govind* [8]. It is alleged that the sentence of excommunication was passed on insufficient grounds and without proper inquiry; but this is a mere allegation without any proof. The excommunication will be presumed to be just and proper unless and until the contrary is proved.

PARSONS, J.:—In this case the plaintiff, who is the *pujári* of a temple at Gavan, sued for an injunction to restrain the defendants from entering the temple and from touching and worshipping the idol, on the ground that they had been excommunicated by the Swámi for misconduct. The defendants, admitting the power of the Swámi to excommunicate for proper cause, disputed the fact and the legality of the excommunication.

The Judge of the lower appellate Court held that the Civil Court had jurisdiction to grant the injunction, but that it could not inquire into the validity of the order of excommunication. I do not agree with the latter proposition in this case where civil rights are at stake. The parties are Jains and the Swámi is their religious chief; as such he may have the power to excommunicate offenders against the tenets of their religion, but when it is sought to extend a civil sanction to an ecclesiastical offence, by enforcing the order of excommunication and thereby depriving persons of civil rights which otherwise they would be entitled to exercise, it must always be open to the Civil Court, whose aid is invoked to

(1) (1889) 13 Mad., 293.
(2) (1886) 10 Mad., 133.
(3) (1893) 21 Cal., 463.
(4) (1886) 11 Bom., 185.
(5) (1887) 11 Bom., 534.
(6) (1893) 17 Mad., 222.
(7) (1883) 6 Mad., 381.
(8) (1887) 11 Bom., 534.

enforce it, to inquire if the order was made by the Swámi in the proper exercise of his power.

On this point there seems to be no conflict of authority. In *Krishnasami* v. *Virasami*[1] an expulsion from caste was held invalid on the ground of the *ex parte* nature of the enquiry. In *Venkatachalapati* v. *Subbarayadu*[2] an enquiry was ordered as to whether an exclusion from caste and, therefore, from the temple shrine was justified. In *Ganapati Bhatta* v. *Bharati Swami*[3] it was held that it was only in a matter relating to caste customs over which the ecclesiastical chief has jurisdiction and exercises his jurisdiction with due care and in conformity to the usage of caste that the Civil Courts cannot interfere. In *Advocate General of Bombay* v. *David Haim Devaker*[4] the same principle was enunciated, namely, that, if the domestic tribunal has acted in a manner consonant with the ordinary principles of justice, a Civil Court has no jurisdiction to interfere, but the proceedings must have been conducted with fairness. So also in *Jagannath Churn* v. *Akali Dassia*[5] it is laid down that it is open to Courts of justice to interfere with the decision of a private association if it is shown, in the first place, that the rules of the association according to which the decision is arrived at, are contrary to natural justice, or secondly that the decision is against the rules of the association, or thirdly that the decision has not been come to *bonâ fide*. In *Pragji* v. *Govind*[6], West, J., says: "It is plain that the Civil Courts may discuss and deal even with a caste question where the membership and the character of a member have been unjustly injured. To take evidence of the customary law of a caste, to recognize the law and the vote of a majority as given effect to by the law, is not to interfere in caste questions; it is simply to recognize the existence of caste as corporations with civil rights and an autonomy suitable to the purposes of their existence." The District Judge cites *Dayaram* v. *Jethabhat*[7] as laying down a contrary proposition, but he has not correctly interpreted that decision, which was passed as was expressly stated "in the cir-

(1) (1886) 10 Mad., 133.
(2) (1889) 13 Mad., 293.
(3) (1893) 17 Mad., 222.
(4) (1886) 11 Bom., 185.
(5) (1893) 21 Calc., 463.
(6) (1887) 11 Bom., 534.
(7) (1895) 20 Bom., 784.

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cumstances of the present case" and depended upon pleading and submission and not upon general jurisdiction.

In the case we are now dealing with, the sentence of excommunication was passed, not by a caste, but by an individual, the Swámi or religious chief of the sect to which the parties belong. Its legality is disputed by the defendants, who say that they were guilty of no offence for which a sentence of excommunication could properly be passed, and that the inquiry into their conduct was held by the Swámi *ex parte* and without any notice being given to them. I think that a Civil Court has jurisdiction to inquire into that plea and that it lies on the plaintiffs, who seek to enforce the sentence and by virtue of it to deprive the defendants of their civil rights, to prove that it was passed on justifiable grounds and after a fair and proper enquiry.

We, therefore, frame an issue on that point, namely :—Was the sentence passed on justifiable grounds and after fair and proper inquiry? and ask the Judge of the lower appellate Court to find on it, taking evidence if necessary, and certify his finding to this Court within two months.

RANADE, J. :—In this case, the parties are Jains, and belong to different branches of the family of the *pujáris* of a temple. The original claim was for an injunction to prevent the appellants from entering the temple, and worshipping the idol, and the ground on which the injunction was sought was the alleged excommunication of the appellants by the Swámi of the caste, who it appears had also some hand in the management of the temple, and had appointed the respondent-plaintiff to officiate as *pujári*. The appellants denied the Swámi's right over the temple, as also plaintiff's claim to be *pujári*, and they further denied the alleged excommunication and misconduct. Finally, they urged that the claim was in the nature of a caste question, and, as such, excluded from the jurisdiction of Civil Courts.

The Court of first instance held that the Court had jurisdiction, that the plaintiff was of the *pujári* family, that the appellant-defendants had been excommunicated, and for a justifiable cause, and that the injunction sought for should be granted until such time as the appellants were re-admitted to caste. The appellants in their grounds of appeal to the District Court raised the question

of jurisdiction, as also of respondent's right to sue, and of the fact and validity of the excommunication. The District Judge, however, laid down only two issues, as to (1) whether the Civil Court had jurisdiction, and (2) whether the excommunication was justifiable. He found both these issues in the affirmative, and confirmed the decree. Though this finding on the second issue apparently suggests that the District Judge was satisfied that the excommunication was proper and justifiable, yet it is clear, from the express words used towards the conclusion of the judgment, that what the District Judge really found on this point was that the Civil Court had no power to inquire into the validity or justification of the Swámi's excommunication. If the question was one which could be considered open for inquiry, the District Judge clearly stated his view that there were no definite grounds for the excommunication, and none which the Courts would regard as adequate. In other words, while, in so far as the respondent-plaintiff's claim for injunction was concerned, the District Judge was inclined to hold that it was a matter within the cognizance of Civil Courts, yet when the factum and justification of the alleged excommunication on which the claim for injunction was based were denied, the District Judge was of opinion that the Courts could not inquire into such a defence. These two positions seem to be obviously inconsistent, and I feel satisfied that a careful consideration of the authorities does not lead to any such conflict.

If the position of the parties had been reversed, and the present appellants had brought the suit to establish their right to the office of *pujáris*, or to enter the temple and worship the idol, it is plain that they would have a perfectly clear right to require the Courts to entertain such a suit, and if the defence raised was of excommunication, to ask the Courts to inquire into the factum and binding character of that action. It has been decided in a large number of cases that a suit for restoration to caste and for obtaining a declaration that the expulsion was not justified, would lie in the Civil Courts—*Gursangaya* v. *Tamana*[1]; *Pragji* v. *Govind*[2]; *Anandrav* v. *Shankar*[3]; *Vengamuthu* v. *Pandaveswara*[4].

(1) (1891) 16 Bom., 281.
(2) (1887) 11 Bom., 534.
(3) (1883) 7 Bom., 323.
(4) (1882) 6 Mad., 151.

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Archalam v. *Udayagiry*[1]; *Srinivasa* v. *Tiruvengada*[2], *Krishnasami* v. *Krishnamacharyar*[3]. In *Gopal* v. *Gurain*[4], the suit was brought by plaintiff to secure his restoration to caste from which he had been expelled by reason of a charge brought by defendant against him of adultery. In such a case it was held that the defendant may plead justification, and plaintiff may show that the charge was false. In *Venkatachelapati* v. *Subbarayadu*[5], it was ruled that the right to worship in a public temple is a civil right, and when it is questioned on the ground of excommunication, it is competent to the Courts to inquire into the defence and they are bound, when necessary, even to examine the religious foundations on which the excommunication is based. In such an inquiry it must be shown that the Swámi had jurisdiction, and that there was an express declaration and that the excommunication was passed in accordance with usage, and after hearing the explanation of the person charged. This same view was expressed still more strongly in *Jagannath Churn* v. *Akali Dassia*[6]. There also the plaintiff's right to enter a prayer house was resisted on the ground of an alleged expulsion by the majority of the Samaj. The Court followed the ruling in *Gopal* v. *Gurain*[7] and dissented from the Bombay ruling in *Pragji* v. *Govind*[8]. It was observed that even if this last ruling were accepted, it would be still necessary to see if the rule or order of the majority was properly arrived at in a *bonâ fide* manner, and that it was in conformity with natural justice. In *Ganapati Bhatta* v. *Bharati Swami*[9], which was also a case of expulsion from caste, it was held that a guru has, no doubt, a right to exercise his jurisdiction according to caste usage, and when he exercises his jurisdiction with due care and in accordance with custom, Civil Courts will not interfere with his action—*Murari* v. *Suba*[10]. If these limits are exceeded, there is no protection—*Queen* v. *Sankara*[11]. Similarly it was held in *Krishnasami* v. *Viasami*[12], that even when the expulsion had been ordered under a *bonâ fide*, but mis-

(1) (1869) 4 M. H. C. R., 349.
(2) (1888) 11 Mad., 450.
(3) (1882) 5 Mad., 313.
(4) (1867) 7 Cal. W. R., 299.
(5) (1889) 13 Mad., 293.
(6) (1893) 21 Cal., 463.
(7) (1867) 7 Cal. W. R., 299.
(8) (1887) 11 Bom., 534.
(9) (1893) 17 Mad., 222.
(10) (1882) 6 Bom., 725
(11) (1883) 6 Mad., 381.
(12) (1886 10 Mad., 138.

taken, belief on a point of fact, and it was shown that plaintiff had not been guilty of the misconduct imputed to him, he has a right to have the order of expulsion set aside. Kernan, J., who decided the case, observed that 'a caste custom permitting expulsion without notice would be invalid. The caste institution is not above or outside the law. Usage and custom exist only under, and not against, the law.'

When a man had been expelled from his caste for alleged adultery, and the caste had allowed him no opportunity to defend himself, the order of expulsion was set aside—*Vallabha* v. *Madusudanan* (1). The fact is that in such matters the Courts treat caste corporations like any other voluntary societies or clubs. If their proceedings are *bonâ fide* and fairly conducted, their action is upheld and not otherwise. The principle of the rulings in *Advocate General* v. *David Haim Devalar* (2), which was a dispute between Beni Israelite parties, and the case in *Gompertz* v. *Goldingham* (3), which related to a club, apply equally to expulsions from caste. If there is jurisdiction, and the procedure is fairly conducted and *bonâ fide*, the action of the caste, corporation, or club is upheld. If possible, for the reasons stated by the Judges who decided the case of *Jajannath Churn* v. *Akali Dassia*, the Civil Courts have to be more careful in the matter of caste expulsions than is necessary in the case of voluntary associations. It might be indeed contended that section 21 of Regulation II of 1827 imposes a special limitation on the power of the Courts of this Presidency. This contention is, however, not correct. As laid down by West, J., in *Anandrav* v. *Shankar*, and affirmed by the same Judge in *Pragji* v. *Govind*, and by Sargent, J., in *Murari* v. *Suba*, section 21 of Regulation II of 1827 only prevents such interference as is likely to affect the autonomy of caste tribunals. The section itself provides a remedy in the matter of alleged injury to caste or character in the shape of damages. This means that Courts have jurisdiction when the injury is due to the illegal or unjustifiable conduct of the other party. Such suits must be clearly distinguished from caste disputes proper. Claims between rival factions of the same caste to common caste

(1) (1889) 12 Mad., 495. (2) (1886) 11 Bom., 185.
(3) (1886) 9 Mad., 319.

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property, claims to leadership of caste, claims to require voluntary offerings and honours and presents to be paid to particular members, claims to officiate as priests against the consent of the caste, claims for compulsory invitations to dinners, &c.—*Girdhar* v. *Kalya* (1); *Dullabh* v. *Narayan* (2), *Murar* v *Nagria* (3); *Murari* v. *Suba*; *Archalam* v. *Udayagiry*, *Gossain Doss* v. *Gooroo Doss* (4), *Krishnasami* v. *Krishnama*, *Dayaram* v *Jethabhai*; *Mayashankar* v. *Harishankar* (5), *Karuppa* v. *Kolanthayan* (6), *Joy Chunder* v. *Ramchurn* (7), *Sudharam* v. *Sudharam* (8), *Shankara* v. *Hanma* (9); *Struman* v. *Krishna* (10).—These are matters which affect the internal autonomy of the caste and its social relations, and suits in regard to them have been properly held to be barred by section 21 of Regulation II of 1827 and similar enactments in other parts of India.

But where, as in this case, a man's character and status as a member of a caste is called in question, and on the strength of an alleged excommunication it is sought to deprive him of the use of a priestly office connected with a temple, with lands and perquisites attached to it, it is clear that the Courts must inquire into the factum of excommunication, and to see that the expulsion was in accordance with caste usage and in conformity with natural justice. It may not be possible for a Court to determine the adequacy of the religious grounds on which the excommunication is based, but it can and ought to satisfy itself that there are fair and *bonâ fide* grounds for such action. There is nothing in the record to show that the excommunication in the present case fulfilled this character. It appears that the misconduct attributed to the appellants is that they did not attend upon the Swámi, and that they refused to allow a share in the temple lands in their possession to the other sharers. The District Judge himself states that there are no adequate grounds for the alleged expulsion. It is also not clear whether the Swámi has a right of dismissing or employing the *pujári* in the temple, or whether the

(1) (1880) 5 Bom., 83.
(2) (1867) 4 Bom. H. C. Rep., A C. J., 110.
(3) (1869) 6 Bom. H. C. Rep., 17.
(4) (1871) 16 Cal. W. R., 198.
(5) (1886) 10 Bom., 661.
(6) (1883) 7 Mad., 91.
(7) (1866) 6 Cal. W. R., 325.
(8) (1869) 3 Beng L. R., 91.
(9) (1877) 2 Bom., 470.
(10) (1863) 1 Mad. H. C. Rep., 301.

excommunication has been resorted to in order to compel obedience to the wishes of the *bháubands* for a share in the temple lands.

If the appellants as plaintiffs had a right to require the Courts to make an inquiry into the factum and regularity and *bona fides* of the excommunication proceedings, it is clear they have a stronger right as defendants to insist upon such inquiry before an injunction is given against them.

We must, therefore, remand the case for a finding upon the issue about the regularity and *bona fides* of the excommunication.

Case remanded.

N. B.—Upon remand the District Judge found that the sentence of excommunication was not passed on justifiable grounds after a fair and proper inquiry.

On this finding the High Court reversed the decree of the lower Court and dismissed the suit.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade

RAJARAM AND ANOTHER (ORIGINAL DEFENDANTS NOS 1 AND 2), APPELLANTS. *v* GANESH (ORIGINAL PLAINTIFF AND DEFENDANT NO 4), RESPONDENTS.*

1898. *February* 28.

Gift—Revocation of gift—Vritti—Gift of vritti—Validity of such gift—Compulsory alienation of vritti invalid—Private alienation not absolutely prohibited.

When a gift is made, the donor taking all the steps in his power to give effect to it, it is complete, and he cannot revoke it by a subsequent will

A *vritti* cannot be sold in execution of a decree Such a compulsory alienation is not only opposed to the Hindu law and public policy, but is also against the provisions of section 266 of the Code of Civil Procedure (Act XIV of 1882). But private alienations are not absolutely prohibited. No general rule can be pleaded in such matters. The rules of succession depend upon each particular foundation or office, and in respect of it, custom and practice must govern and prevail over the text law which prohibits both partition and alienation.

SECOND appeal from the decision of Ráo Bahádur D. G. Gharpure, Additional First Class Subordinate Judge at Násik.

*Second Appeal, No. 948 of 1897.

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One Bhikambhat was the original owner of the property in dispute, which consisted of (1) a house at Trimbak, (2) one-fourth share in an inám village, (3) a right of service in the temple of Shri Trimbakeshwar, and (4) one-half share in the *upadhikpana vritti*[1] on the *Kushavarth Firth*, which is a sacred place at the source of the Godávari.

Bhikambhat made a gift of the whole of the property in dispute to the plaintiff by a *bakshis patra* (deed of gift) dated 10th November, 1888.

At the date of the gift the house and the inám village were in the possession of a mortgagee to whom Bhikambhat had mortgaged them. Bhikambhat, however, handed over to the plaintiff such documents of title as he had with him relating to the property, and he also applied to the Revenue authorities to transfer his share in the inám village to the plaintiff's name.

As to the *vritti*, plaintiff entered upon the duties of his office immediately after the execution of the deed of gift.

On the 5th January, 1891, Bhikambhat adopted defendant No. 1 and made a will by which he revoked the deed of gift to the plaintiff and bequeathed the whole of his property to his adopted son (defendant No. 1). Bhikambhat died shortly afterwards.

In 1894 plaintiff filed the present suit to establish his title to the property under the deed of gift executed by the deceased in his favour.

The defendants pleaded (*inter alia*) that the deed of gift was invalid on the ground that it was not accompanied with possession, and as to the *vritti* and the right of service in the temple contending that Bhikambhat was not competent to alienate them to a complete outsider and stranger to the family.

Both the lower Courts held the gift valid and awarded the plaintiff's claim.

Defendants thereupon preferred a second appeal to the High Court.

(1) The *vritti* is a priestly office in virtue of which certain religious services are performed on behalf of pilgrims to the *tirth*, who pay fees to the holders of the *vritti* for the performance of those services. See (1886) 10 Bom., 395.

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Daji Abaji Khare, for appellants:—The deed of gift is invalid because it was not accompanied by delivery of possession. Part of the property in dispute was not in the possession of the donor at the time of the gift. It was then, and is still, in the possession of the mortgagee. As regards the *vritti* and the right of service in the temple, the donor continued in possession after the execution of the deed, since we find that the donee signed the receipts for the payments made to him in the donor's name. The gift was, therefore, incomplete and it was afterwards revoked by the donor by his will. But assuming that the gift was complete, still it is open to the objection that the *vritti* as well as the right of service in a temple are inalienable under the Hindu law. A religious office cannot be made the object of sale, mortgage or gift, and the emoluments of the office are absolutely *extra commercium*—*Rajah Vurmah Valia* v. *Ravi Vurmam*(1); *Narasimma* v. *Anantha*(2). *A vritti* is a right of personal service and as such cannot be attached or sold in execution of a decree—*Ganesh* v. *Shankar*(3). In the present case the *vritti* was transferred to a perfect stranger. Such an alienation outside the family is bad—*Kuppa* v. *Dorasami*(4); *Durga Bibi* v. *Chanchal Ram*(5).

N. G. Chandavarkar, for respondents:—It is found as a fact by both the lower Courts that the gift was carried out by the donors taking all the steps necessary to give effect to it. This finding is conclusive on this Court in second appeal. As to the alienability of a *vritti,* it is too broad a proposition to assert that a *vritti* is absolutely inalienable. No such rule is deducible from the decided cases. On the contrary the Courts have upheld the alienation of a priestly office to a member of the founder's family standing in the line of succession—*Sitarambhat* v. *Sitaram*(6); *Srinivasa* v. *Rengasami*(7); *Manchaiam* v. *Pranshankar*(8). Even an alienation to a stranger has been allowed where such alienation is in the interest of the endowment—*Khetter Chunder Ghose* v. *Hari Das*(9). No doubt it has been held that a *vritti*

(1) (1877) 1 Mad., 235.
(2) (1881) 4 Mad., 391.
(3) (1886) 10 Bom., 395.
(4) (1882) 6 Mad., 76.
(5) (1881) 4 All., 81.
(6) (1869) 6 Bom. H. C. Rep., 250 (A C.J.)
(7) (1879) 2 Mad., 304.
(8) (1882) 6 Bom., 298.
(9) (1890) 17 Cal., 557.

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cannot be sold in execution of a decree. But the grounds on which such an alienation is forbidden, do not apply in the case of a private alienation. If a *vritti* were subject to attachment and sale, the auction-purchaser might be a Mahomedan or a Christian, and he would be both unwilling and incompetent to perform the services to an idol. But these objections do not apply to the alienation in the present case. In *Sadashiv* v. *Jayantibai* (1), this Court has allowed the sale of a *vritti* even in execution of a decree. It is not, therefore, correct to say that a *vritti* cannot be alienated under any circumstances. It is for the Court to determine in each case whether the alienation is one that can be upheld.

RANADE, J.:—The appellants' pleader in this case raised only two contentions in his argument before us,—first, that the gift in this case was invalid, because it was not carried out by transfer of possession, and was subsequently revoked by the donor, and secondly, that the alienation of the *vritti* was invalid as being the alienation of an hereditary priestly office outside the family to a stranger.

As regards the first contention, both the Courts below have found in respondent's favour, that the possession was transferred to the respondent by the donor taking all the steps necessary and in his power to effect it. This is a question of fact, and we must accept the concurrent finding of both the lower Courts as binding on us in second appeal. The donor transferred the documents relating to the *vritti* to the respondent, and he also applied to the Revenue authorities to transfer his interest in the inám village to respondent. The donor was not in possession of the inám village and the house, which he had mortgaged to his creditors, and transfer of actual possession was in the nature of things impossible till the debt was paid off. The duty of service in the temple was performed by the respondent, who signed the receipts in the donor's name. We must, therefore, overrule this objection. If the gift was carried out by the donor's taking all the steps in his power to give effect to it, it was complete, and the donor had no power to revoke it by a subsequent will, as was sought to be done in the present case.

(1) (1883) 8 Bom., 185.

The other ground of invalidity presents more difficulty. It appears that the objection that a *vritti* was inalienable was raised in the Court of first instance, and decided against the appellants before us. In the District Court, the point was again raised, but the judgment of the lower appellate Court shows that it was not pressed there. This of course does not deprive the appellants of their right to raise the question in second appeal—*Kuppa* v. *Dorasami*[1].

It appears from the authorities cited, and from others which will be noticed further on, that a distinction has been made by the Courts between *vrittis* such as those in dispute in this case, and defined in *Ganesh* v. *Shankar*[2], and the right of hereditary service in temples, private and public, and between alienation to strangers and to members of the family, and, lastly, between compulsory and private alienation. Compulsory alienation by way of sale in execution of decrees has been disallowed in all cases as being not only opposed to Hindu law and public policy but against the provisions of section 266 as being rights of personal service—*Ganesh* v. *Shankar*; *Govind* v. *Ramkrishna*[3]; *Kalee Churn* v. *Bungshee Mohun Doss*[4]; *Durga Bibi* v *Chanchal Ram*[5]; *Dubo Misser* v. *Srinibas Misser*[6]. Such compulsory sales might transfer such properties to persons disqualified to perform the duties of the office. In the case of private alienations, this objection does not hold equally good, and private alienations are not absolutely prohibited. Alienations to strangers are indeed not favoured, as will be seen from the rulings in *Rajah Vurmah Valia* v. *Ravi Vurmah*[7], *Narasimma* v. *Anantha*[8], *Raja Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty*[9], *Koyake-Ilata Kotel Kanni* v. *Yadattil Vellayangot*[10], *Rajah of Cherakal Kovilagom* v. *Mootha Rajah*[11], *Venkatarayar* v. *Srinivasa Ayyangar*[12].

Most of these decisions relate to temple offices in Madras Presidency where the sentiment against alienation is very

(1) (1882) 6 Mad., 76.
(2) (1886) 10 Bom., 395.
(3) (1887) 12 Bom., 366.
(4) (1871) 15 Cal. W. R., 339.
(5) (1881) 4 All., 81.
(6) (1870) 5 Beng. L R, 617.
(7) (1876) 4 I. A, 76
(8) (1881) 4 Mad, 391.
(9) (1877) 1 Mad., 235.
(10) (1868) 3 Mad. H. C. Rep., 380.
(11) (1873) 7 Mad. H C. Rep, 210.
(12) (1872) 7 Mad. H. C. Rep, 32.

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strong. In other parts of India, the restrictions are less strictly enforced, especially when the alienee is a nearly related member of the family. In this Presidency it was ruled in *Sitarambhat* v. *Sitaram Ganesh* [1] where the dispute related to a temple office, that alienation to grand-children by way of relinquishment on the part of the grandfather was not illegal. The principle was re-affirmed in *Manchanan* v. *Puranhanhar* [2], where the dispute related to a *joshi vritti*, and it was held that alienation to a member in the line of succession or to a possible heir, bandhu or sapinda, would not be illegal unless there was any express direction of the founder, or rule or usage to the contrary. In *Khetter Chunder Ghose* v. *Hari Das Bundopadhya* [3] the alienation by the entire family of the sebaits of private idol with its endowed land to a stranger was upheld as being in the interest of the idol, and calculated to carry out the objects of the original founder. A similar transfer in respect of a public temple was held to be legal—*Konwar Doorganath Roy* v. *Ram Chunder Sen* [4]. Where the alienation is made by one out of several joint owners for his own benefit, the transfer was held to be illegal —*Kupa* v. *Dorasami*; *Narasimma* v. *Anantha*. In *Ukoor Doss* v. *Chunder Sekhur Doss* [5] such a transfer was held to be invalid beyond the life-time of the alienor. In *Kuppa* v. *Dorasami*, transfer to a person not in the line of heirs was disallowed. In *Durga Bibi* v. *Chanchal Ram*, alienation outside the family was held to be illegal. In *Sadashiv* v. *Jayantibai* [6], on the other hand, the execution of a decree directing the sale of a *vritti* was upheld.

It will be thus seen that in the case of private alienations the prohibition is not of general application. As observed by their Lordships of the Privy Council, no general custom can be pleaded in such matters. The rules of succession depend upon the nature of each particular foundation or office, and in respect of it custom and practice must govern and prevail over the text law which admittedly prohibits both partition and alienation—*Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* [7]; *Greedharee*

(1) (1869) 6 Bom. H. C. Rep., 250.
(2) (1882) 6 Bom., 298.
(3) (1890) 17 Cal., 557.
(4) (1876) 2 Cal., 341.
(5) (1865) 3 Cal. W. R., 152.
(6) (1883) 8 Bom., 185.
(7) (1874) 1 I. A., 209.

Doss v. *Nundo Kissore Doss Mohunt*[1], *Rajah Vurma Valia* v. *Ravi Vurma Mutha*; *Genda Puri* v. *Chhatar Puri*[2]; *Durga Bibi* v. *Chanchal Ram*; *Ramlingam Pillai* v. *Vythilingam Pillai*[3]; *Manchharam* v. *Pranshankar*. By force of custom, however, a limited right of partition and alienation might be established, and the custom must be ascertained by evidence in each class of cases.

As this point has not been formally inquired into, it becomes necessary to send down the following issues and obtain a finding on the same:—

(1) Whether a custom and practice of the alienation or gift of the *vritti* in dispute and of the service in the temple was established either generally or as limited to particular classes of heirs or relations?

(2) Whether the appellant's gift falls within or is governed by such custom and limitations?

The finding and evidence taken, if any, should be certified to this Court within two months.

(1) (1867) 11 Moore's I. A., 405. (2) (1886) 13 I. A., 160.
(3) (1893) 16 Mad., 490.

FULL BENCH.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, Mr. Justice Candy and Mr. Justice Fulton.

BHAVRAO AND OTHERS (ORIGINAL DEFENDANTS NOS. 17, 19 AND 20), APPELLANTS, *v.* RAKHMIN AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1898. *March* 1.

Partition—Alienation by co-parceners—Possession by alienee—Adverse possession—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 127 and 144.

Where co-parceners have alienated their shares in the joint property by sale and mortgage, and the alienees have been in possession for more than twelve years, a claim for partition is, as against such alienees, barred by limitation under article 144 of the Limitation Act (XV of 1877).

Pandurang v. *Bhaskar*[1] distinguished.

*Joint Second Appeals, Nos. 989 and 990 of 1896.

(1) (1874) 11 Bom. H. C. Rep., 72.

1898.

BHAVRAO v. RAKHMIN.

Article 127 of Schedule II of the Limitation Act (XV of 1877) does not apply except in cases between members of a joint family. It does not apply to the case of a stranger to the family holding property which originally belonged to the family. As to him the ordinary rule of limitation (article 144) applies.

SECOND appeals from the decision of M. P. Khareghat, District Judge of Ratnágiri.

Suit for partition and possession. The plaintiffs claimed a one-fifth share of a portion of the village of Bhelsai, which itself had been previously partitioned. Most of the land in question was, however, in the possession, not of the co-sharers, but of their alienees, to whom they had from time to time sold or mortgaged their shares. These alienees were made defendants to this suit and some of them pleaded adverse possession for more than twelve years. The defendants were eighty-five in number.

The lower Courts granted partition. The District Judge was of opinion that, as regarded the right of partition, there was no adverse possession and that article 144 of the Limitation Act (XV of 1877) did not apply. The following is an extract from his judgment:—

"It has been argued that all the alienations prior to 12 years before suit are free from resumption, as the suit with respect to them is barred by article 144 of Schedule II of the Limitation Act. But I think otherwise. If the original sub-sharers had continued in possession, it is clear that this suit for partition of what was admittedly joint property could not have been barred even against an outsider (see 11 Bom. H. C. Rep., 72). I do not see, therefore, why it should be barred if the sub-sharers put their mortgagees or vendees in possession. Those vendees and mortgagees admittedly took possession knowing it was joint property liable ultimately to partition; they did nothing to show the other sub-sharers that they denied their right of partition. There was, therefore, no adverse possession as respects the right of partition, and article 144 is inapplicable. Of course, these alienees have got the equitable right of having the alienated property assigned, as far as possible, to the shares of their respective alienors; but if they have anything in excess, it can be resumed just as it could have been from the original sub-sharers to equalize the shares.

Two separate groups of defendants appealed to the High Court (Appeals Nos. 989 and 990 of 1896). The appeals came before a Division Court (Farran, C.J., and Candy, J.), which referred the following question to a Full Bench:—

"Whether on the facts stated by the District Judge the claim for partition of the lands which have been in the possession of vendees and mortgagees and

holders under alleged purchases, for more than twelve years, is barred by limitation."

The Full Bench consisted of Farran, C. J., Candy and Fulton, JJ. Both appeals were heard together.

Maneksha J. Taleyarkhan and *Mahadev R. Bodas* for appellants (defendants):— We have been in possession as mortgagees and vendees for more than twelve years under mortgages and sales made by co-sharers of the plaintiff. It is contended that our long possession is no defence against a claim for partition, and that the plaintiffs can recover the land from us. We contend that our possession has been adverse to their claim, and that their claim is barred by article 144 of the Limitation Act—*Datto* v. *Babaji*(1); *Ganesh* v. *Ramchandra*(2). Our mortgage-deeds purport to mortgage specific lands to us, and the mortgagors (the co-sharers) are described as the owners. We had nothing to do with any of the co-sharers, except the mortgagors, and, therefore, so far as regards others our possession has been adverse. No doubt it is true that co-sharers in possession do not exclude each other, and that possession of co-sharers is not adverse to the other co-sharers. But an alienee of a co-sharer is not a co-sharer. He is a stranger and he does exclude the others, and his possession is adverse—*Bejoy Chunder* v. *Kally Prosonno*(3); *Lakshman* v. *Moru*(4). Article 144 of the Limitation Act (XV of 1877) applies—*Ram Lakhi* v. *Durga Charan*(5); *Horendra* v. *Aunoardi*(6); *Muttusami* v. *Ramkrishna*(7); *Rane* v. *Rane*(8). The case of *Pandurang* v. *Bhaskar*(9) relied on by the Courts below does not apply.

Vasudev Gopal Bhandarkar for respondents (plaintiffs):—The plaintiffs have a right to partition and possession as against the defendants. Those of the defendants who have purchased from co-parceners have no better title than their vendors as against the other co-parceners—*Pandurang* v. *Bhaskar*(9). The defendants took the lands knowing they were joint property.

(1) P. J., 1894, p. 149.
(2) (1895) 20 Bom., 557.
(3) (1878) 4 Cal., 327.
(4) (1892) 16 Bom., 722.
(5) (1885) 11 Cal., 680.
(6) (1887) 14 Cal., 544.
(7) (1889) 12 Mad., 292.
(8) (1866) 3 Bom. H. C. Rep., 173 (A.C.J.)
(9) (1874) 11 Bom. H. C. Rep., 72.

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Article 127 of the Limitation Act does not bar the plaintiffs' claim—*Horendra* v. *Anoardi*[1]. This suit would lie against the co-sharers and, therefore, it lies against their assignees. *Hanma* v. *Malalev*[2], *Viragak* v. *Meinai*; *Chinto* v. *Janki*[4].

FARRAN, C. J.:—We think that the question referred for our decision should be answered in the affirmative.

The first point to consider is what article of the schedule to the Limitation Act is applicable to the case. We think that article 144 is the article which applies. The only alternative article which can be suggested is article 127, but we do not think that it is applicable. That article deals with the limitation applicable to joint family property. It provides a special rule of limitation applicable to that class. In the case of such property mere lapse of time is of no avail. There must be exclusion to the knowledge of the person excluded before limitation begins to run. It is applicable only to property belonging to members of what may in common speech be called a joint family—*Bavasha* v. *Masumsha*[5]. The Allahabad and Madras High Courts would confine its operation to property of a joint family in the technical or Hindu sense of the term—*Amme Raha* v. *Zia Ahmad*[6]; *Paicha* v. *Mohidin*[7]. It does not, in our opinion, apply to the case of a stranger to the family holding property which originally belonged to the joint family. As to him we think that the ordinary rule of limitation is applicable. The principal decisions upon this point are collected in Starling on Limitation, p. 251 (Ed. 1895). We need only refer to *Kartick Chunder* v. *Saroda Sundari Debi*[8]; *Muttusami* v. *Ramkrishna*[9].

The article applicable to the case must, therefore, be article 144 and the inquiry is limited to this:—Has the possession of the alienees been adverse to their respective alienors and their co-parceners or not? It can hardly, we think, be contended that their possession was not adverse to their alienors. The latter

(1) (1885) 14 Cal., 544.
(2) (1893) 18 Bom., 513.
(3) (1894) 19 Bom., 138.
(4) (1892) 18 Bom., 51.
(5) (1889) 14 Bom., 70.
(6) (1890) 13 All., 282.
(7) (1891) 15 Mad., 57.
(8) (1891) 18 Cal., 642.
(9) (1889) 12 Mad., 292.

sold or mortgaged to their respective alienees certain defined and distinct portions of the estate, which had been in their exclusive possession and put the purchasers in possession of the same. The deeds are clear and unequivocal in their terms. The alienors convey to the alienees separate portions "out of their share", using these words or words to that effect. The boundaries are given of the plots conveyed and the alienors covenant for title. It cannot, we think, be said that a purchaser entering under such a deed, whether it be a deed of sale or a mortgage, does not enter as owner, absolute or qualified as the case may be, of the particular plot of land so conveyed to him, and not as purchaser of a right to ask the Court upon a partition to have that particular plot, which he has purchased, assigned to his alienating co-parcener in order to give effect to his purchase according to the principle laid down in *Pandurang* v. *Bhaskar*[1].

What, then, is the purchaser's position with reference to the co-parceners of his vendor or mortgagor? The answer, we think, must be that, as he enters as owner and in right of his conveyance, his possession is adverse to them also. In the eye of the law, all the co-parceners, though for the sake of convenience they may be in separate possession of portions of the joint estate, are the owners of the whole estate including the alienated portion. It may be and indeed is the case that such a purchaser by his purchase does not get a good title to the land conveyed to him by a single co-parcener, but only the qualified right laid down in *Pandurang* v. *Bhaskar* (*supra*), and he is liable under some circumstances even to be evicted if the co-parceners take the requisite steps within the statutory period. Nevertheless his exclusive possession does not on that account cease to be adverse. He, entering as owner, his possession must, we think, necessarily be adverse to the true owners. Adverse possession depends upon the claim or title under which the possessor holds and not upon a consideration of the question in whom the true ownership is vested—whether in a single person or in many jointly. "Adverse possession is possession by a person holding the land, on his own behalf, or of some person other than the true owner"

(1) (1874) 11 Bom. H. C. Rep., 72.

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—Per Markby, J., in *Bejoy Chunder* v. *Kally Prosonno*[1]. In favour of such a holder limitation begins to run from the date of his possession, provided the true owner is not under disability and is capable of suing.

The District Judge lays stress in this case upon the fact that the alienees must have known that the alienors were separate holders of property held in co-parcenery; indeed he speaks of such knowledge as being admitted. The statements of the defendants, the alienees, in their pleadings scarcely admit, we think, of being construed so unfavourably to them, but admitting that the defendants did know that the land which they were purchasing formed part of an undivided estate, we do not think that it affects the question. A person coming in under a title, which he knows to be defective, or even a trespasser is not by reason of his knowledge deprived of the benefit of the law of limitation. The principle expressed in article 126, which affords a clear analogy to the present case, applies, we think, alike to a purchaser with and to a purchaser without notice.

The view which we have above expressed is in accordance with the decision in *Datto* v. *Babaji*[2], but in that case it does not appear that the defendant knew that he was purchasing the interest of one branch of the family only. The decision in that case was cited with approval in *Ganesh* v. *Ramchandra*[3].

The judgment in *Pandurang* v. *Bhaskar* (*supra*) on this branch of the case, upon which the District Judge relies, does not, we think, at all militate against the view which we have arrived at. It was there held that Bhaskar, the purchaser of Nilo's share in a joint estate, had to show that Nilo's claim against Pandurang, Nilo's co-parcener, was not barred at the date of his purchase. To that extent he was identified with Nilo. If Nilo was barred, Bhaskar was barred too. That is clear. Bhaskar's purchase appears to have been shortly before suit. The sale was in 1871 and the suit in 1874. If Bhaskar's purchase had been more than twelve years before suit, different considerations would have arisen. The case, moreover, is rather the converse of the present and is not a ruling against the defendants, the alienees,

(1) (1878) 4 Cal., 327. (2) P. J. for 1894, p. 149.

(3) (1895) 20 Bom., 557.

who are defending their possession and not seeking the aid of the Court as plaintiffs.

The inconvenience of a contrary ruling to that which we have expressed is shown by the practice which prevails in the Ratnágiri District from which these appeals come. There the ordinary condition of a *khoti* estate held in co-parcenery appears to be that the parceners should be in occupation of separate portions of the estate—*Babashet* v. *Jirshet*[1]. This condition originally adopted temporarily for the convenience of the co-parceners often continues for very long periods without an actual partition taking place. In the above case it appears to have continued for more than 150 years. Another instance of the practice will be found in *Sakho* v. *Narayan*[2]. A purchaser thus might be in possession of land which he had purchased for valuable consideration for 50 years or more, considering himself to be the owner, and after that period the co-parceners of his vendor, by filing a suit for partition amongst themselves and adding him as a party, might deprive him of it. No limitation would ever run in his favour. If knowledge is important, an inquiry into the knowledge with which he purchased would have to be made. It is to avoid such inquiries as these, and to quiet titles depending upon possession, that statutes of limitation exist. The same reasoning applies to the lands in respect of which the defendants in possession have not been in a position to prove the deeds of sale.

As to the contention that the plaintiffs' share was under mortgage at the date of the alienation, it was a question which was not raised in the lower Court, or referred to the Full Bench. It is of little more than academical interest, as it only extends to the plaintiffs' one-fifth share in those lands. We shall leave the Division Bench to deal with it.

Appeal referred to Division Bench for disposal.

(1) (1868) 5 Bom. H. C. Rep., A J., 71.
(2) (1869) 6 Bom H. C. Rep., 238 (A.C.J.)

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

1898.
March 28.

GANPAT (ORIGINAL PLAINTIFF), APPELLANT, *v.* ANNAJI (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu law—Joint family—Family property—Family firm—Partnership—Partnership suit between members of joint family—Suit by a co-parcener for an account of the profits of a joint family firm—Injunction—Exclusion of partner.

A member of a joint Hindu family cannot maintain a suit for an account of the profits of a partnership which is alleged to be joint family property, and an award of his share in such profits when ascertained.

This rule of Hindu law does not prevent an injunction being granted in cases in which one member of the family is prevented from taking part in the business of the firm.

SECOND appeal from the decision of W. H. Crowe, District Judge of Poona.

The plaint stated that the parties to the suit were full brothers possessed of joint ancestral property, consisting (*inter alia*) of a shop at Poona; that the defendant did not allow the plaintiff to enter the shop, inspect the account books, and take part in the management of the shop; and that the defendant had been acting in a manner detrimental to the joint business.

The plaintiff, therefore, sued (1) for an account of the cash, stock in trade, and of the debts and liabilities of the Poona shop, and for an award of such sum as might be found due to him on taking accounts; (2) that the defendant might be held liable for such sums as might have been lost by negligence or laches on his part; and (3) for an injunction restraining the defendant from excluding the plaintiff from the joint possession and management of the shop.

The defendant pleaded (*inter alia*) that he and the plaintiff were not joint and did not carry on joint dealings; that a partition had been effected between the parties in accordance with an award dated 16th August, 1894; and that the suit as framed would not lie.

The Subordinate Judge held that the suit in its present form would not lie; and that as there was admittedly other joint

* Second Appeal, No. 1106 of 1897.

family property, moveable as well as immoveable, over and above the joint business, the suit ought to have been for partition of the entire family estate. The suit was, therefore, dismissed.

This decision was affirmed, on appeal, by the District Judge.

The plaintiff thereupon preferred a second appeal to the High Court.

Branson (with him *P. P. Khare*), for appellant.

Ganpat S. Rao, for respondent.

FARRAN, C J. :—We agree with the lower Courts in thinking that the plaintiff claiming to be a member of a joint Hindu family cannot maintain a suit for an account of the profits of the Poona partnership which he alleges to be joint family property and an award of his share in such profits when ascertained. This is in accordance with the general rule of Hindu law which governs such cases.

Counsel for the appellant did not controvert that view. What he contended was that his client was entitled to maintain a suit for the injunction which he sought, restraining the defendant from excluding him from the joint possession or management of the Poona shop, and we are of opinion (assuming his allegations to be proved) that the plaintiff is entitled to that portion of the relief prayed for. The plaintiff ought not, we think, to be refused relief to which he is entitled, because he seeks in addition relief to which he is not entitled. There is no rule of law which prevents the Court from interfering to protect a partner in the enjoyment of his rights. The cases will be found collected in Lindley on Partnership, page 538, and Ker on Injunctions, page 510. We need only refer to the case of *Z* v. *X*[1], where an injunction was granted restraining the other partners from preventing one member of the firm from transacting the business of the partnership. The rule of Hindu law does not prevent an injunction being granted in cases of the ouster of one member of the family from an item of family property—*Anant Ramrav* v. *Gopal Balvant*[2] and *Ramchandra* v. *Damodhar*[3].

(1) (1855) 2 K. and J., p. 441. (2) (1894) 19 Bom., 269.
(3) (1895) 20 Bom., 467.

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We reverse the decrees of the lower Courts and remand the case to the Court of first instance to be dealt with on the merits having regard to this judgment. Costs, costs in the cause.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, Mr. Justice Ranade and Mr. Justice Fulton.

1898. *March* 10.

SADASHIV VAMAN DHAMANKAR (ORIGINAL DEFENDANT), APPELLANT, *v.* TRIMBAK DIVAKAR KARANDIKAR (ORIGINAL PLAINTIFF), RESPONDENT.*

Minor—Capacity to contract—Contract Act (IX of 1872), Secs. 2, 10, 11, 247, 248—Ratification—Release by minor father of his interest in joint property to his son—Family arrangement—Voluntary conveyance by father to son—Transaction impeached by subsequent creditors.

Per FARRAN, C. J., and RANADE, J., (FULTON, J., dissenting):—In India the contract of a minor is not void, but voidable only, and is capable of ratification after he attains majority.

A release by a minor father of all his right and interest in the ancestral property to his son *held* to be valid if ratified by the donor after he attained majority.

Per RANADE, J.:—The property sought to be protected by the release was admittedly ancestral property, and Vaman's minor son had a half share in it, of which the minor could at any time claim partition. The release was only intended to protect Vaman's one-half share against the consequences of his own improvidence. When all existing debts were paid off and settled, Vaman's right to make a voluntary conveyance of the same in his minor son's interest cannot be questioned. Such conveyances are well known in English law, and there have been cases in India also where Courts have given effect to such voluntary conveyances or gifts by a father to his son—*Ganga Sahai* v. *Hira Singh*(1). Such transactions do not become colourable merely because, in their ultimate consequences, they have the effect of protecting the family property against the prospective extravagance of the settlor, or because no adequate consideration is shown to have been paid by the party benefited.

Per FULTON, J.:—Apart from section 7 of the Transfer of Property Act, 1882 (which was not in force in the Presidency of Bombay when the release of 1887 was executed) a conveyance depends on a preceding contract and cannot be valid unless the party making it is competent to contract. Without an antecedent agreement to give and receive there can be no transfer at all. The

* Second Appeal, No. 669 of 1896.

(1) (1880) 2 All., 809.

power to convey must depend on the power to contract. Unless it can be held that the provisions of section 10 of the Contract Act were not meant to be exhaustive, and it was intended to leave out of consideration agreements by minors, we must hold that a minor is incompetent to contract.

Vaman Sadashiv, a minor member of an undivided Hindu family, in 1887 executed a release of his right and interest in certain ancestral property to his minor son. In 1892 the plaintiff obtained a decree against him in respect of a debt incurred subsequently to the date of the release, and he sought to attach the released property in execution of his decree. He impeached the validity of the release.

Held (by FARRAN, C. J., and FULTON, J. (RANADE, J., dissenting) that the release was inoperative, and that the plaintiff was entitled to attach the property in execution of his decree,

By FARRAN, C. J., on the ground that it had not been ratified by Vaman after he attained his majority.

By FULTON, J., on the ground that the release was absolutely void and incapable of ratification.

Per FARRAN, C. J., and RANADE, J., (FULTON, J., dissenting):—The release was voidable only at the option of the minor (Vaman), and was not void, and if it was ratified or not repudiated by him on attaining majority, it was, in the absence of fraud, a valid transaction, at least as against judgment-creditors whose debts were of a subsequent date.

SECOND appeal from the decision of L. G. Fernandez, First Class Subordinate Judge of Thána, with appellate powers.

Suit for a declaration that certain property was liable to attachment in execution of plaintiff's decree against one Vaman Sadashiv, the father of the defendant.

The decree was obtained in 1892 by the plaintiff against Vaman Sadashiv, and in 1893 the property was attached in execution. Thereupon the guardians of the defendant, who was a minor, applied to have the attachment removed. They claimed that by a release dated 12th October, 1887, long before Vaman's debt to the plaintiff had been incurred, Vaman had released all his interest in the property to his son the defendant, and that consequently it was not liable to attachment for his debts.

The attachment was accordingly removed on the 27th August, 1893, and the plaintiff then filed this suit.

The property released was ancestral property, having been inherited by Vaman from his adoptive father. At the date of the

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release, Vaman and his son the defendant were jointly interested in it as members of a united family, and by the release Vaman purported to make over all his right and interest therein to the defendant. The document recited his inability to manage the estate and an arrangement made by his sister Subhadrabai that she would allow him Rs. 15 a month for his maintenance in case he should execute it, and proceeded as follows :—

"Knowing that the object of my father was that the estate should not be wasted, that the same should always remain with the family, and knowing also that your object also is that the estate should remain for the benefit of the boy, I agree to your above proposal, and having waived all my right to and interest in the whole of the undermentioned immoveable and moveable 'estate,' I have given (the same) to Sadashiv Vaman, in respect of which I have given this release in writing.

"The whole of the abovementioned immoveable and moveable property has been this day given into your possession and charge, and all the papers relating to the *vahivat* and ownership of the immoveable property have been delivered into your possession for enjoyment (thereof). To the said property I have (now) left in me no right, title and interest of any kind whatever. I will get the immoveable property transferred to your name in the Government records at any time you may require me to do so. I have duly given this release in writing of my own accord. The handwriting of Vinayak Narayan Gogte, an inhabitant of Panvel."

It appeared that in 1891 an application was made to the District Court for a certificate of administration to the estate of the defendant, who, as already stated, was a minor. Vaman opposed the application and in the course of the proceedings denied and repudiated the above release. He subsequently, however, withdrew his opposition to the application.

The Court of first instance dismissed this suit, holding that the release was valid and genuine, and that the property was, therefore, not liable to Vaman's debts.

On appeal the lower Appeal Court reversed the decree and passed a decree for the plaintiff, holding the release invalid and inoperative on the grounds (1) that Vaman was a minor when he executed it in 1887, (2) that he did not ratify it on attaining majority, and (3) that it was a colourable transaction and did not operate to transfer Vaman's interest to his son (the defendant).

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On second appeal the main points argued were (1) whether the lower appellate Court was wrong in holding that the release was a colourable transaction not really intended to transfer the property and as such void as against Vaman's creditors; (2) whether, having regard to the provisions of the Indian Contract Act (IX of 1872), a minor was capable of contracting at all, and whether, therefore, the release in question, being made by Vaman while he was a minor, was absolutely void or merely voidable; and (3) if voidable whether the lower Court was wrong, in law, in holding that Vaman had not ratified the release after attaining majority.

The Judges of the Appeal Court differed in their judgments. Ranade, J., was of opinion that the decree of the lower Court should be reversed and the suit dismissed, holding (1) that the transaction was *bonâ fide*; (2) that the release executed by Vaman as a minor was only voidable, and not void; and (3) that it had been ratified by him after he came of age.

Fulton, J., was of opinion that the decree of the lower Court should be confirmed and a decree passed for the plaintiff on the ground that under the Contract Act a minor is incapable of binding himself by contract or execution of a deed of transfer, and that such contract or transfer is void and incapable of ratification on attaining majority. He, therefore, held the release to be invalid. He was further of opinion that in second appeal the High Court was bound by the finding of the lower Court, that the release was merely colourable and not intended to transfer the property.

The following judgments were delivered:—

RANADE, J.:—In this case, as also in the two other appeals heard along with it, the contest lies between certain judgment-creditors, who obtained decrees against one Vaman Sadashiv Dhamankar in 1892, and in execution of the same attached in 1893 certain properties as belonging to Vaman, and the appellants, who are certificated administrators, appointed by the District Court, of the estate of Vaman's minor son, who obtained possession of the said properties on the strength of a release in favour of his minor son executed by Vaman on 12th October,

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1887, and who succeeded in removing the attachment of the said creditors on 27th August, 1893. These three suits were accordingly filed in 1894 to obtain a declaration that the properties in dispute were liable to be attached and sold in execution of the decrees against Vaman, and that the release of 12th October, 1887, conferred no rights on Vaman's minor son to the same. The validity of the release-transaction was thus the principal point in issue between the parties, and there was also a further complication created by the circumstance that Vaman was alleged to have been a minor himself when he executed the release in 1887. The Court of first instance held that Vaman was not a minor at the time of the execution of the release, and that the release was a genuine and valid transaction, which transferred Vaman's interests to his minor son so that the property in dispute being included in the release, was not liable to attachment and sale at the instance of Vaman's creditors. In appeal these decrees were reversed, as the lower Court of appeal held that Vaman was a minor when he executed the release in 1887, and that he did not ratify the release on attaining majority, and, lastly, that the release was a colourable transaction and effected no transfer of Vaman's interest to his minor son; so that the properties in dispute were liable to attachment and sale.

In second appeal, the three points to which the arguments of learned counsel on both sides were confined were: (1) whether Vaman was a minor at the time of the execution of the release; (2) whether he could on attaining majority ratify the release so as to validate it, and whether he did so ratify it; and (3) whether the release was a genuine and valid transaction, or only a colourable one which effected no transfer of interest. These are points of mixed law and fact. So far as they relate to matters of fact, this Court is bound to accept the findings of the lower Court of appeal.

In regard to Vaman's age in October, 1887, I must, therefore, accept as final the decision of the lower Court of appeal, namely, that he was under 21 years at the time. As his adoptive mother had taken out a certificate of guardianship and administration, her subsequent death shortly after would not enable Vaman to

attain his legal majority when he was 18 years old. The appellants' contention to the contrary is opposed to a series of rulings both of this Court—*Yeknath* v. *Warubai*[1], and of the Calcutta High Court—*Girish Chunder* v. *Abdul Selam*[2], *Rudra Prokash* v. *Bhola Nath*[3], *Chunee Mul Johary* v. *Brojo Nath Roy*[4]—and I must, therefore, overrule this objection.

The next point for consideration is whether Vaman could ratify, after attaining majority, the release executed by him when he was legally a minor; and if so, whether there was a legal ratification of the same; in other words, whether the release was a void or voidable transaction, and if the latter, whether it was repudiated by Vaman. It is necessary to discuss this point in some detail, for my learned colleague, Mr. Justice Fulton, has come to a different conclusion from mine. His view is that a minor is incapable of binding himself by contract or execution of a deed of transfer, and that such contract or transfer is void and incapable of ratification on attaining majority. This view is chiefly made to rest on the wording of the definition of "contract" given in section 10, which presupposes parties competent in respect of age (section 11), and on the corresponding provisions of the Transfer of Property and Trusts Acts. I regret to be unable to accept this view, and I hold that the point is concluded by a long course of decisions.

The law as it stood prior to the Contract Act has been clearly expressed by Mr. Justice Markby in *Hari Ram* v. *Jitan Ram*[5] decided in 1869. In this case the mortgage-bond was executed by the agent of a minor owner and registered, and the mortgagee was in possession. This possession was sought to be disturbed by the auction-purchaser of the minor's right, title and interest on the ground that the bond was void and of no effect. It was held in that case that the transaction was voidable only, and that until it was so avoided by some distinct act of the minor on his attaining majority it must be considered to be a valid transaction.

(1) (1898) 13 Bom., 285.
(2) (1886) 14 Cal., 55.
(3) (1886) 12 Cal., 612.
(4) (1882) 8 Cal., 967.
(5) (1869) 3 Ben. L. R., 426.

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Then came the Contract Act of 1872, and the construction to be placed on section 10 of that Act was considered by the Calcutta High Court in *Sashi Bhusan* v. *Jadu Nath*[1]. Garth, C.J., and McDonell, J., held that the lower Court's view that a bond passed to a minor was void by reason of its being entered into by a party not competent to contract, was not correct. Their Lordships observed further that "the language of the Indian Contract Act may well have led to this mistake. A contract entered into with a minor is only voidable at the option of the minor." The same point was similarly decided by Sargent, C.J., and Nanabhai Haridas, J., in *Hanmant* v. *Jayarao*[2]. It will be noted that while in *Hari Ram* v. *Jitan Ram*, the mortgage-bond was passed by an agent of the minor owner, in the two other cases noted above the bonds were passed in favour of the minor, but this circumstance was held not to make any difference, notwithstanding the terms of the Contract Act. The question whether any and what change was effected by the Contract Act in regard to the validity of contracts and transfers by minors, was again considered by the Calcutta High Court in *Mahamed Arif* v. *Saraswati Debya*[3], in which case Tottenham and Trevelyan, JJ., held "that a transfer by a minor was only voidable under Hindu law. Apart from the Contract Act, ... this transaction must be held valid, as it was not avoided by the minor." In the Contract Act "there is no express provision declaring the contract of an infant to be void, but it is said that section 2, sub-sections (*g*) and (*h*), and sections 10 and 11 have this effect. ... In the case of *Sashi Bhusan* v. *Jadu Nath*[1], a Division Bench held that a contract entered into with a minor was only voidable at the option of the minor. We have carefully considered this decision. The question is one of some difficulty, but on the whole we prefer to follow the decision to which we have referred." The case of *Sham Charan* v. *Chowdry Debya*[4] was also on a bond passed by a minor for raising money to defend himself in a certain prosecution instituted against him, and the Judges held that the minor was liable on the contract. In *Watkins* v.

(1) (1885) 11 Cal., 552.
(2) (1888) 13 Bom., 50.
(3) (1891) 18 Cal., 250.
(4) (1894) 21 Cal., 872.

Dhunnoo Baboo[1], a minor was similarly held liable for the costs of a suit in which he was defendant, and in which his property was in jeopardy. The only case which appears to militate against this current of authorities is that of *Fatima Bibi* v. *Debnauth Shah*[2], where Norris, J., expressed his view that "a minor in this country cannot contract at all, and that no other construction can be put on section 11 of the Act. But whether I am right or wrong, does not seem to signify as far as this case is concerned, because this is a case of specific performance of contract" and it has been decided that a minor cannot claim specific performance. Such a hesitating expression of opinion by a single Judge on a point not directly arising in the case cannot, in my opinion, be set against the numerous decisions of Division Benches of this and the Calcutta High Courts, where the operation of the Contract Act was expressly considered. I am accordingly inclined to hold that this point is concluded by the authorities noticed above, and that a minor's contracts and transfers are not absolutely void acts, but only voidable at his option on attaining majority.

Even if the question were not so concluded by authority, I should be inclined to come to the same conclusion on general grounds. The Contract Act expressly enumerates eight classes of void agreements, and a minor's contracts are not included in this list. Sections 20 and 24-30 have a common feature that they relate to the nature of the subject-matter, and have no relation to the parties contracting. Contracts founded on a mistake of facts common to both parties, wager contracts, contracts in restraint of trade, marriage, and legal proceedings, contracts without consideration, or for unlawful consideration, or uncertain agreements—all these have this common feature, and what is true of agreements is true of contracts, for contracts are defined to be agreements enforceable by law. Where a contract is enforceable on one side, but not on the other, such contracts are expressly defined to be *voidable*, and not *void*. A minor's liability for contracts for necessaries must be affirmed under every system of law; only section 68 makes his property, but not the

(1) (1881) 7 Cal., 140.

(2) (1893) 20 Cal., 508.

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person of a minor, liable in this case. The Contract Act itself expressly recognizes a minor partner's liability (section 247), and the Transfer of Property Act, which follows the Contract Act, section 7, in this respect, similarly recognizes a minor donee's obligation, when he accepts a gift burdened with conditions, and does not repudiate the gift. These circumstances show that the Legislature could never have intended to affirm a general and total incapacity of minors, as such, to enter into contracts. The minor who executed the release in this case actually put himself forward as a man who had attained majority, and he took bonds and *kabuláyats* in his own name one or two years before the release. Though technically a minor, he was a married man, and had a minor son born to him a year or two before the release, and the evidence of minority was so conflicting as to lead two competent Judges to two different conclusions. He was old enough to run into extravagance, and repent of the same. I should hesitate, therefore, to lay down that such a minor's contracts were absolutely void.

As shown above, the authorities are all the other way, and I, therefore, hold that the release in this case was voidable only at the option of the minor, and was not void, and that if it was ratified, or not repudiated by the minor on attaining at age of majority, it was in the absence of fraud a valid transaction, at least as against those judgment-creditors whose debts were of a subsequent date to the release.

The question of ratification has been considered by the lower Court of appeal from a legally wrong point of view. It has relied chiefly upon the circumstance of Vaman's opposition to the appellant's application for a certificate of administration to the minor's estate in 1891, and certain stray acts of Vaman committed by way of self-assertion. As regards the opposition to the certificate proceedings, it is to be noted that he withdrew the same on further consideration. The statements of Vaman in these certificate proceedings, made by him before he withdrew his opposition, are entitled to no weight, seeing that they were made to serve his immediate purpose of the hour. It is not this opposition made five years after the relase, but his conduct soon after

attaining majority, that ought to have been considered by the lower Court of appeal—*Hari Ram* v. *Jitan Ram*[1]. Vaman admittedly attained his majority in 1888-89, and the evidence of his conduct in that year, and in the following two years, shows clearly that he fully accepted the situation created by the release. The debtors and tenants of Vaman passed bonds, *khátas*, *kabuláyats*, receipts and agreements in favour of his minor son represented by his guardian or next friend Sundrabai (*alias* Subhadrabai), and a hundred such exhibits have been filed in the case, of Shake 1810, 1811, 1812. Suits were brought in the son's name, and darkhásts given to execute decrees. On some of the bonds and agreements passed in favour of the minor son, Vaman made endorsements, Exhibit 257, acknowledging receipt of payments, and one of these bonds is attested by one of the judgment-creditors in these suits, Exhibit 108. Taking all the transactions of these five years, it is quite plain that without Vaman's active concurrence, such a renovation of contracts could not have taken place. During all that time, Vaman only executed two sale-deeds, Exhibits 269, 270, in his own name, and appears to have appropriated two sums for which he passed receipts, Exhibits 58, 59. The two subsequent receipts, Exhibits 254, 255 are of a doubtful character, because the present appellants gave notice and made protests. Such conduct and acquiescence on Vaman's part leave no room for doubt that he not only did not repudiate the release, but actually co-operated in giving effect to it after attaining majority. I accordingly hold that the release was duly ratified by Vaman.

Such conduct might also operate by way of estoppel against Vaman and Vaman's subsequent creditors—*Ganesh* v. *Bapu*[2]; *Sarat Chunder* v. *Gopal Chunder*[3]. Estoppel under section 115 of the Evidence Act operates even against minors who put themselves forward as majors, and prevents them and those who claim under them from raising the question of their incompetency to the detriment of those who, acting on the faith of such representations, have been led to enter into certain transactions.

The third and most important question to be considered is whether the release was a merely colourable transaction, and as

(1) (1869) 3 Ben. L. R., 426. (2) (1895) 21 Bom., 198.
(3) (1892) 20 Cal., 296.

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such void against Vaman's judgment-creditors. On this point also, so far as the decision of the lower Court relates to a matter of fact, I am bound to accept its finding that Vaman's sister Subhadrabai did not, as she stated, pay any money of her own to satisfy Vaman's creditors. The point is not very material, as all existing debts were admittedly paid off by Vaman, or for him by his sister Subhadrabai. The evidence is clear that all Vaman's creditors at the time of the release were paid off, and that the debts of the judgment-creditors in these three cases are all of a subsequent date, contracted apparently in 1891, when the application was made for a certificate. There was thus admittedly no fraud practised or intended against old creditors of Vaman by those who advised him to execute the release, and who were well-wishers of his family, being in fact the pleaders who conducted the judgment-creditors' suits in these three cases.

It appears to me that the lower Court of appeal did not correctly apprehend the true nature of the release transaction. The property sought to be protected by the release was admittedly ancestral property, and Vaman's minor son had a half share in it, of which the minor could at any time claim partition. The release was only intended to protect Vaman's one-half share against the consequences of his own improvidence. When all existing debts were paid off and settled, Vaman's right to make a voluntary conveyance of the same in his minor son's interest cannot be questioned. Such conveyances are well known in English law, and there have been cases in India also where Courts have given effect to such voluntary conveyances or gifts by a father to his son—*Ganga Sahai* v. *Hira Singh*[1]. Such transactions do not become colourable merely because, in their ultimate consequences, they may have the effect of protecting the family property against the prospective extravagance of the settlors, or because no adequate consideration is shown to have been paid by the party benefited.

The consideration in such cases need not be valuable. It is enough if it is what the law regards as good, *i. e.*, natural affection for wife and children. There is nothing illegal in such a conveyance if it is made *bonâ fide*, and is not intended to defraud

(1) (1880) 2 All., 809 at p. 811.

creditors. When the father is involved in debts and makes a settlement, *mala fides* is presumed. But when there is no such indebtedness, no *mala fides* can be presumed merely from the possibility that the settlement might prejudice the claims of subsequent creditors. The lower Court appears to have lost sight of this distinction, which the law makes between the claims of existing and subsequent creditors when it presumed against the *bona fides* of the release chiefly on the ground of its being prejudicial to the interests of Vaman's subsequent creditors. In the present case, the advisers of Vaman were aware of this distinction, and insisted on the prompt payment of all existing debts, and these were admittedly paid off, and every effort made to give the widest publicity to the transaction, and avoid all secrecy or underhand dealing. Under these circumstances, there was no room for presuming any fraudulent intention on the part of Vaman or his advisers. In the words of Chancellor Kent, "fraud in a voluntary conveyance was an inference of law in so far as it concerns existing debts. There is no such legal presumption as regards subsequent debts. There must be proof of positive fraud in fact" to vitiate a voluntary conveyance. No such evidence of positive fraud is forthcoming in the present case. If the release were a *bonâ fide* voluntary conveyance in its inception, it could not become colourable because the settlor, long after its execution, contracted more debts, and under the pressure of his creditors sought for a time to encroach upon his minor son's rights in breach of the settlement, after he had ratified the same by his active co-operation. Both the grounds on which the lower Court of appeal has relied, namely, absence of consideration, and prejudice to prospective creditors, in support of its view that the release was a colourable transaction, appear to me to be erroneous as reasons for upsetting a *bonâ fide* settlement in the nature of a voluntary conveyance duly made and acted upon.

I would, therefore, reverse the decree of the lower Court and restore that of the Subordinate Judge in this and in the other two appeals and dismiss the claims. Under the circumstances I would direct each party to bear his own costs.

(1) Story's Equity Jurisprudence, paras. 350—359. *Twyne's Case*, 1 Smith's Leading Cases, p 52.

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As there is a difference of opinion between myself and Mr. Justice Fulton, and the difference relates to important points of law, we now order, under section 575 of the Code, that the case may be referred to a third Judge, or either the Chief Justice or such other Judge or Judges as he may appoint.

FULTON, J.:—It appears that in 1887 Vaman Sadashiv while still under the age of 21 executed a document purporting to convey to his infant son Sadashiv the whole of his estate subject to a reservation in his own favour of an allowance of Rs. 15 per mensem to be paid out of the income. It is not suggested that the deed was executed in fraud of existing creditors, as arrangements were made to pay them off by Subhadrabai at whose instance the transaction took place. The object, assuming that the conveyance was intended to represent a real transaction and to give the son exclusive rights of ownership against the father, was, I think, legitimate. By thus settling the property it was meant to protect it against the effects of Vaman's extravagance. The deed was registered and was thus open to the inspection of persons having dealings with him if they chose to take the trouble to search for alienations. Assuming, then, that the deed represented a real and not a mere *benami* transaction, no case of fraud seems to arise—*Rajan Harji* v. *Ardeshir*[1].

After the date of the deed, Vaman incurred debts. The plaintiff is one of his creditors who obtained a decree against him and in execution attached the property. Subsequently the attachment was removed at the instance of Sadashiv's guardians; and the plaintiff now sues to have it declared that the property is liable to attachment and sale in execution of his decree.

The question, then, arises whether under the deed above referred to, or at any subsequent period, Vaman is proved to have conveyed the property to Sadashiv, not as a mere *benamidár*, but as a beneficial owner. That Vaman was a minor when he executed the conveyance, seems clear. The First Class Subordinate Judge, A. P., has found that he was under 21. A guardian of his person and property had been formerly appointed under Act XX of 1864, and although that guardian was dead, the effect of the appoint-

(1) (1879) 4 Bom., 70.

ment was, I think, to prolong the minority up to 21 under the provisions of section 3 of Act IX of 1875. The section runs as follows:—"Subject as aforesaid, every minor of whose person or property a guardian has been or shall be appointed by any Court of justice and every minor under the jurisdiction of any Court of Wards shall, notwithstanding anything contained in the Indian Succession Act (X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of 21 years and not before: Subject as aforesaid every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not before."

On the mere wording of the section it seems clear that Vaman remained a minor until 21, as a guardian of his person and property had been appointed. But in *Yeknath* v. *Warubai*(1) a doubt was suggested whether on the death of such guardian the position of the minor would not revert to what it was prior to the appointment. In argument on this question we were referred to decisions in *Mungniram Marwari* v. *Gursahai*(2) and *Girish Chunder* v. *Abdul Selam* (3), but they do not directly deal with the point. The case of *Rudra Prokash* v. *Bhola Nath*(4), however, is a distinct authority on the point, which has, moreover, been recently determined in this Court by the decision in *Gordhandas* v. *Harivalabdas*(5).

The next question to be determined is whether property can be conveyed by a minor. The subject is one on which I write with diffidence, for it is one of much difficulty. Apart from section 7 of the Transfer of Property Act (which was not in force in this Presidency when this document was executed) it seems to me that a conveyance necessarily depends on a preceding contract and cannot be valid unless the party making it is competent to contract. There must be an agreement to give and to receive, and the property passes when this concurrence of intentions is arrived at, and such forms as the law prescribes are completed.

(1) (1888)13 Bom., 285.
(2) (1889) 16 I. A., 195.
(3) (1886) 14 Cal., 55.
(4) (1886) 12 Cal., 612.
(5) (1896) 21 Bom., 281.

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The transfer may not take place till some act, such as the delivery of possession or the execution and registration of a conveyance, has been performed, but without an antecedent agreement to give and to receive there can, I think, be no transfer at all. I have not been able to find any express authority on this point, but it seems to me that the power to convey must necessarily depend on the power to contract, for it would be a strange anomaly if a person while unable to bind himself with a promise were competent to give away his property. I am, therefore, obliged to consider the provisions of the Indian Contract Act in order to see whether in this country a minor can contract.

The object of the Act as stated in the preamble is to define and amend parts of the law relating to contracts. In section 2 a "contract" is defined for the purposes of the Act as an agreement enforceable by law. In section 10 there is a further definition as follows:—"All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared to be void." Section 11 declares that "every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject." Then in section 19 there is a special provision which enacts that "when consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused." Sir F. Pollock in discussing the question expresses a doubt whether the expression "voidable contract" is not open to objection (see p. 9 of the 6th edition of his Treatise on Contracts), but however this may be, it is clear that under the Indian Contract Act it is only the definition under section 19 which makes the transaction therein described a contract, for it does not come within the terms of section 10 not having been effected by free consent. There is no similar provision in regard to agreements by minors or lunatics, but section 68 provides for the payment for necessaries supplied to persons incapable of entering into contracts. The section does not state who such

persons are, but illustration (*a*) leaves no doubt that lunatics are included. According to English law it appears that a contract by a lunatic or person incapable through drunkenness of knowing what he is doing, is not necessarily void when the other party was not aware of his condition. See *Imperial Loan Co.* v. *Stone* [1], *Molton* v. *Camroux* [2], and *Matthews* v. *Baxter* [3]—also Pollock on Contracts, pp. 90 and 91. But in this country the liability of persons of unsound mind to pay for necessaries and to make compensation for other services rendered to them seems to rest on the provisions of sections 68 and 70 of the Act rather than on contract. Under the Act, minors appear to be in a similar position.

Sections 247 and 248 deal specially with the admission of minors to partnerships and their liabilities thereunder, but furnish, I think, no argument in favour of their competence otherwise to contract.

It seems, then, to follow that unless it can be held that the provisions of section 10 of the Contract Act were not meant to be exhaustive, and it was intended to leave out of consideration agreements by minors, we must hold that in India a minor is incompetent to contract. It cannot, however, be suggested that the subject was lost sight of, for, among the qualifications for contracting, majority is specified in section 11. The Act, it is true, does not purport to deal with the whole law of contract, but it does purport to define certain parts of it, and one of these parts is the method of effecting contracts, and if it be open to hold that agreements by minors have not been dealt with, it must be remarked that sections 10 and 11 are very misleading. To hold now that these sections do not comprehend within their scope the subject of agreements by minors, seems to me inconsistent with the views expressed by Lord Herschell in *The Bank of England* v. *Vagliano* [4] relied on by the Privy Council in *Norendra Nath Sircar* v. *Kamalbasini Dasi* [5]. The passage to which I refer is as follows:—

(1) (1892) 61 L. J. (Q. B.), 449.
(2) (1848) & (1849) 18 L. J., (Ex.), 63 and 356.
(3) (1873) 8 Ex., 132.
(4) (1891) A. C., 107, at p. 144.
(5) (1896) 23 I. A., p. 26.

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"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view It a statute intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used"

In my humble opinion these words are applicable to the subject now under consideration.

If we hold that minors' agreements are only voidable and not void, not only must we impute to the Legislature in enacting sections 10 and 11 of the Contract Act intentions which are by no means apparent, but we shall have also to import similar intentions into the Transfer of Property Act and the Indian Trusts Act enacted ten years later. Section 4 of the former Act says that the portions relating to contracts shall be taken as part of the Indian Contract Act, and section 7 provides that persons competent to contract are competent to transfer property. The reference in section 127 to a person not competent to contract must apparently relate to minors and persons of unsound mind. Section 7 of the Indian Trusts Act is as follows:—

"A trust may be created—

(*a*) By every person competent to contract.

(*b*) With the permission of a principal Civil Court of original jurisdiction by or on behalf of a minor."

The assumption in this section seems to be that without the special provision contained in clause (*b*) a minor being a person incompetent to contract would be incompetent to create a trust. This is the view taken by Mr. Agnew in his Treatise on the Law of Trusts: *vide* p. 125.

The question as to the nature of agreements by minors does not seem to me to be settled conclusively by authority either in this Presidency or in Calcutta. On the one hand we have the

decisions in *Sashi Bhusan* v. *Jadu Nath* (1) and *Mahamed Arif* v. *Saraswati Debya* (2) that no change was made in the law on this subject by the Contract Act. But on the other hand the opposite view was taken by Mr. Justice Norris in *Fatima Bibi* v. *Debnauth Shah*(3). In *Sham Charan* v. *Chowdhry Debya* (4) the learned Judges appeared to accept the opinion that a minor's contract was voidable rather than void, but in *Jugul Kishori* v. *Anunda Lal* (5) the point was left undecided. In *Hanmant* v. *Jayarao*(6) the decision that a minor could enforce a bond passed in his favour, the consideration having been wholly received, seems in no way inconsistent with the opinion that an agreement by a minor cannot be enforced and is not a contract. In *Mahableshwara* v. *Timapa*(7) the subject is discussed by Sargent, C.J., and Candy, J., but the point is left undecided.

If the definition of an "agreement" be referred to, it will be seen that it includes a single promise as well as a set of promises forming the consideration for each other. Consequently in the case of promises made to minors for consideration wholly received there seems no difficulty in treating such promises as contracts, for they are made by persons competent to contract for consideration received. Though a minor under the Act may be incompetent to promise, it does not seem to follow that a promise made to him for consideration received is not binding. The case of *Sashi Bhusan* v. *Jadu Nath* (1) deals with such a transaction, though it must be admitted that the language of the judgment appears to suggest that an agreement by a minor is voidable rather than void.

Where the consideration for a promise to a minor consists either wholly or partially of promises by a minor, a difficulty doubtless arises. But the same difficulty will, I think, be felt whether the promise by the minor is looked upon as void or as merely voidable, for in either case there is a want of mutuality. A promise revocable at the option of the promisor can hardly be treated as consideration until it has been re-affirmed and thereby

(1) (1885) 11 Calc., 552.
(2) (1891) 18 Calc, 259.
(3) (1893) 20 Calc, 508.
(4) (1894) 21 Calc, 872.
(5) (1895) I. L. R., 22 Calc., 545.
(6) (1888) 13 Bom., 50.
(7) P. J., 1890, p. 298.

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been made irrevocable on the attainment of majority. Where owing to the promises made to him the minor has done something or delivered possession of property, the doctrine of estoppel may possibly prevent the repudiation by the adult of his obligation to perform his promises.

The conclusion, then, at which I have arrived, though not without much hesitation and regret at my inability to concur with my learned colleague, is that Vaman when he executed the deed of the 12th October, 1887, was not competent to convey and did not transfer to Subhadrabai or Sadashiv any interest in the estate. If this view of the law be correct, it follows that the property is still vested in Vaman, for it is not suggested that since he attained majority there has been any act on his part forming a fresh conveyance of the estate. If the deed of the 12th October, 1887, is invalid, the defence fails.

Moreover, even if the above opinion be erroneous, the decree of the First Class Subordinate Judge, A. P. must, I think, be confirmed on another ground. The First Class Subordinate Judge on a review of all the circumstances, and bearing in mind the fact that there was no consideration for the deed (for he evidently did not believe that Subhadrabai paid any money out of her own pocket in liquidation of the debt, and must have noticed that the deed contains no allusion to the payment of debts and merely provides for the receipt by Vaman out of the estate of an allowance of Rs. 15 per mensem) came to the conclusion that it was merely a colourable transaction. He seems to have considered that the document was, to use the language of the Privy Council in *Abdul Hye* v. *Mir Mohammed* (1), a mere pocket instrument not intended to operate according to its tenor and effect by which the property was put in the name of Sadashiv for the benefit of Vaman. It will not, I think, be disputed that, if there were no consideration for the deed and no real intention on Vaman's part to make a gift of the property to his son as against himself, the mere execution of the deed would be invalid against creditors. The decision of the Privy Council just referred to is an authority for this proposition. The want of consideration

(1) (1883) 10 Cal., 616.

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is apparent from the language of the deed itself and the absence of any reliable evidence that Subhadrabai defrayed any debts out of her own pocket. The allowance of Rs. 15 per mensem was a reservation out of the estate, and no one undertook any personal responsibility for it. The question of intention is one of fact in regard to which this Court cannot on second appeal do otherwise than accept the finding of the First Class Subordinate Judge. The lower appellate Court was aware that a number of documents were drawn up in Sadashiv's name, but looking to the conduct of the parties and the circumstances of the case, came to the conclusion that the transaction was merely colourable. This decision seems to me to be binding on the Court, for the First Class Subordinate Judge does not appear to have overlooked any evidence or to have been under any misapprehension as to the law applicable to the subject. The law is clearly laid down in *Tillakchand* v. *Jitamal* [1] as follows:—"But if the sale or mortgage be only a colourable transaction, or a mere sham, and not intended to confer upon the alleged grantee or mortgagee any beneficial interest in the property, and simply (for the purpose of screening it from execution) to substitute such grantee or mortgagee as nominal owner in lieu of the real owner (the debtor), and to make such nominal owner nothing more than trustee for the real owner (the debtor), and thus to endeavour to preserve the property for the latter, such a sale or mortgage would be invalid as against the creditor and he would be entitled to attach and sell the property." Possibly in such a case the real reason may be that no property passes, because none is intended to pass. See the extract from Bracton quoted at the end of Pollock on Contracts. "*Item non valet donatio nisi tam dantis quam accipientis concurrat mutuus consensus et voluntas, scilicet quod donator habeat animum donandi et donatarius animum recipiendi.*" But however this may be, there is, I think, sufficient authority for the view of the law taken by the First Class Subordinate Judge.

I am, therefore, of opinion that the decree should be confirmed with costs both in this case and in Second Appeals Nos. 704 and 705 of 1896.

(1) (1873) 10 Bom. H. C. Rep., 206 at p. 210.]

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The Judges having thus differed in opinion, the appeal was referred, under section 575 of the Civil Procedure Code (Act XIV of 1882), to Farran, C. J. He agreed with Ranade, J., upon the first two of the questions above stated, but upon the third he held that there was evidence upon the record upon which the lower appellate Court was entitled to hold that the release had not been ratified. He agreed, therefore, with Fulton, J., that the decree for the plaintiff passed by the lower Court should be confirmed.

The following are the arguments and judgment on the reference :—

Branson (with *Mahadev R. Bodas*), for the appellant (defendant) :—The lower appellate Court has given the plaintiff a decree and has held the property in question to be liable in execution of his decree against Vaman, on the grounds that the release was a sham, and that Vaman did not ratify it after attaining majority, but on the contrary repudiated it. As to the first point, we deny the release was a sham or that it was in fraud of creditors. All the then existing creditors were paid off, and full publicity was given to the transaction—*In re Johnson* (1) ; *Gnanabhai* v. *Srinivas* (2). No new debts were incurred until 1891. It was in the nature of a family settlement. A subsequent creditor is not entitled to impeach it. Fulton, J., has held that Vaman being a minor was incompetent to execute a release which implies a contract. The release here was in the nature of a grant and a grant does not necessarily imply an antecedent contract. This is the case of a gift by a minor father to his minor son which can be ratified by the father on attaining majority—Simpson on Infants, pp. 5, 9, 22, 26, 46, 48 and 182. But, even regarding this as a case of contract we contend that a minor's incompetency to contract does not make his contract void, but only voidable, and it may be ratified by him on his attaining majority—*Mahamed Arif* v. *Saraswati* (3). Vaman ratified this release after he attained majority. His statements in the certificate proceedings in 1891 repudiating the release are not evidence. They were statements made in his own interest and cannot be used by the plaintiff who claims through him. Up to 1891 Vaman gave full effect to the release, which was duly registered.

(1) (1881) 20 Ch. D, 389. (2) (1868) 4 Mad. H. C. Rep., 81.
(3) (1891) 18 Cal., 259.

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Robertson (with *N. G. Chandavarkar*), for the respondent (plaintiff) :—The finding of the lower Court that the release was a sham, and was never intended to be operative except as against creditors, is binding on this Court in second appeal—*Ramratan* v. *Nandu*[1]. Soon after Vaman came of age he asserted his right to the property and in 1891 he repudiated the release in the certificate proceedings. His statements there are admissible under section 33 of the Evidence Act (I of 1872).

Under Indian law the contract of a minor is not voidable but is absolutely void—*Fatima Bibi* v. *Debnauth* [2]. Only those who are of age can contract—Contract Act (IX of 1872), Secs. 10 and 11. See also section 3 of the Registration Act (III of 1877), which forbids registration of a document executed by a minor. If the release, then, was a contract, it was void. Further, there was no consideration for it. It was not love and affection under section 25 of the Contract Act (IX of 1872), for Vaman's object was to protect himself—*Vasudeo Bhat* v. *Venkatesh* [3]. If a trust, it was invalid under section 7 of the Indian Trust Act (II of 1882). If it was a gift, it was a gift by a minor of his whole property, which is invalid—*Hearle* v. *Greenbank*[4]; Simpson on Infants, p. 5; Trevelyan's Law of Minors, p. 272; Strange's Hindu Law, Vol. I, p. 271. See also *Appa Pillai* v. *Ranga Pillai*[5].

Branson in reply :—The payment of Vaman's debts out of the family estate was a sufficient consideration for the release or the undertaking by Vaman's sister to pay Rs. 15 a month to Vaman —*Bithál Das* v. *Shankar* [6]; *Mantappa* v. *Baswantrao*[7].

FARRAN, C. J.:—The learned Judges who heard this second appeal having differed in opinion as to the decree which should be passed upon it, the appeal has been referred to me under section 575 of the Civil Procedure Code. Counsel have been heard and I now proceed to give my judgment upon the several questions which are involved in the reference. In order to define with precision what these questions are, I briefly state the general facts of the case.

(1) (1891) 19 Cal., 249.
(2) (1893) 20 Cal., 508.
(3) (1873) 10 Bom. H. C. Rep., 139.
(4) 3 Atk. Rep., 712.
(5) (1882) 6 Mad., 71.
(6) (1895) 17 All., 264, at p. 271.
(7) (1871) 14 Moo. Ind. Ap., 21.

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The suit was brought by a creditor of Vaman Sadashiv seeking a declaration that certain property which he had attached was the property of Vaman. On the 12th October, 1887, Vaman had executed an instrument, styled a release, in favour of his minor son Sadashiv Vaman, represented by the minor's aunt Subhadrabai *alias* Savitribai. Vaman was her adopted brother much younger than she. The release states that the whole of the property moveable and immoveable, which had descended from Vaman's (adoptive) father Sadashiv Vinayak, had been in Vaman's possession and charge after his mother's death, and goes on to release Vaman's interest in the same in favour of his minor son Sadashiv. The operative parts of the instrument run as follows. (His Lordship read the passage above set forth (p. 118) and continued:—) The Judge in appeal differing from the Court of first instance has come to the conclusion that Vaman was less than 21 years old when he executed the release. He does not find definitely what Vaman's exact age then was, but he states that the evidence, which he considers reliable, shows that Vaman was born in 1868. Vaman was thus at least 19 years of age when he executed the release, but he was, in law, a minor. His adoptive mother, who subsequently died, had been appointed guardian of his person and to administer his estate. The referring Judges are agreed that Vaman was, in law, a minor when he executed the release. They differ as to whether under the circumstances of the case the attaching creditor is bound by the release.

The questions which present themselves as calling for solution are:—

(1) Whether in second appeal we can hold that the lower appellate Court was wrong, in law, in finding that the release represented a colourable transaction, and is ineffectual to exempt the property in suit (which was comprised in the release) from attachment and sale at the instance of the plaintiff? The plaintiff's debt was incurred by Vaman long subsequent to the release.

(2) Whether such a release passed by a minor is absolutely void, or is only avoidable so as to become valid if ratified by such minor after attaining majority?

(3) Whether the lower Court was wrong, in law, in holding that Vaman had not ratified the release after attaining majority?

I have stated the questions in the above order, because, if the release was invalid in its inception, the other questions need not be considered; and also because I desire to keep distinct the first and third questions, though the facts which it is necessary to refer to in order to determine them, are in some instances the same.

Now as to the first question, the execution of the deed being admitted, and it having been registered, the burden of proving that it is invalid lies, I think, upon the plaintiff. Certainly the burden of proving that it was not real, lies upon him—*Sham Chand* v. *Protap Chandra*[1]. I do not say that he need bring forward direct proof that the release was unreal, or that it was fraudulent, but he must prove circumstances from which the unreality of the release, or its fraudulent character, may be legitimately inferred. It is not alleged in this case that the release was obtained by means of fraud or of undue influence exercised over Vaman by his sister Subhadrabai, nor do I think that it would be open to an attaching creditor to impeach it upon that ground. The plaintiff can only succeed by showing (*a*) that the release was made in favour of Sadashiv with the intent of actually conveying the share of Vaman to Sadashiv, but with the further intent to delay, hinder and defraud Vaman's creditors within the meaning of the Statute of Elizabeth, or (*b*) that it was, as Mr. Justice Fulton calls it, a mere pocket instrument, not intended to operate according to its tenor and effect, by which the property was put in the name of Sadashiv for the benefit of Vaman—a mere *benami* transaction. The English cases where real estate or chattels real are concerned, deal almost exclusively with the former class of fraudulent or unreal conveyances. Indeed, it may, I think, be questioned whether under English law a conveyance of real estate when delivered to the grantee does not always, where no fraud has been practised on the grantor, operate to transfer the property in the land, the subject of the conveyance, from the grantor to the grantee, though there may exist a secret trust in favour of the former giving him a right

(1) (1897) 24 I. A., 186.

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to call for the reconveyance of the estate. In India where the *benami* system is common, it has been recognised by our Courts that there may be a sham conveyance, which, though registered and delivered to the grantee, not being intended to pass the property, but merely to be used as a blind to deceive creditors or others, conveys no estate to the nominal grantee: see *Tillakchand* v. *Jitamal* [1], where English decisions relating to goods have been applied to transactions relating to immoveable property in India—*Abdul Hye* v. *Mir Mohammed*[2].

It was not contended in the argument before me, nor, so far as I can see throughout the case, that the instrument in question was of the former class. The circumstances that the then existing debts of Vaman were all paid off by Subhadrabai at or about the time when the release was executed and as part of the same transaction; that the release was registered and publicly notified throughout the district; that its openly avowed object expressed in the instrument itself was to protect the ancestral estate from the consequences of Vaman's imprudence and extravagant habits, preclude the idea that, *if intended to be operative between the parties to it as a release,* it was executed for the purpose of defeating, hindering or defrauding creditors. See the judgment of Mr. Justice Fry in *In re Johnson*[3].

The judgment of the lower appellate Court did not, however, I think, proceed upon the ground that the release was fraudulent within the spirit of the Statute of Elizabeth, but upon the footing that it was a colourable instrument not intended to operate as a release or to convey Vaman's share in the estate to Sadashiv or to divest Vaman of his co-parcenery rights in the property. This was the form in which the issue was raised in the lower appellate Court and this was the issue which that Court decided in favour of the plaintiff.

Upon this part of the case Mr. Justice Ranade considers "that the lower appellate Court did not correctly apprehend the true nature of the release transaction" and "that both the grounds on which the lower Court of appeal has relied, namely, the absence of consideration and prejudice to prospective creditors in support of its

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view that the release was a colourable transaction, appear to be erroneous as reasons for upsetting a *bonâ fide* settlement in the nature of a voluntary conveyance duly made and acted upon"; and that, therefore, the decree should be reversed; while Mr. Justice Fulton considers that there was evidence to support the finding of the lower appellate Court "that the release was a mere colourable transaction, and that Vaman did not intend to release his share in the estate to Sadashiv", and that, therefore, the decree should be confirmed. Mr. Justice Fulton also rested his judgment on the ground of Vaman's minority at the date of the release.

Though the learned Judges appear, at first sight, to have thus approached the consideration of the appeal from somewhat different points of view, I think that it is not really so. Mr. Justice Fulton admits, in the opening paragraph of his judgment, that 'if the intention of Vaman was to pass a real and not a sham document, no case of fraud would arise'—the release would be good as a voluntary conveyance—but thinks that there is evidence upon which the lower appellate Court could find that the release was a sham: while Mr. Justice Ranade considers that the lower appellate Court ought, upon the evidence, to have come to the conclusion that the release was a *bonâ fide* voluntary conveyance, thus in effect holding that there was, in his opinion, no evidence which could support the finding that the release was colourable.

The question, therefore, narrows itself to this: Is there evidence in the case upon which the lower appellate Court's finding can be supported? In my opinion, there is not. The *onus* of proving that the instrument was colourable, rests, as I have shown, upon the plaintiff. I have already adverted to the publicity of the transaction and the payment of all Vaman's debts and the consequent clearing of the estate from all liability. It is not denied that the release was delivered to Subhadrabai and duly registered. There is nothing, therefore, in the circumstances connected with the transaction itself which can cast any doubt upon its reality. The evidence given by Vaman in the certificate proceedings in 1891 must be left out of consideration upon this part of the case. It is not evidence under section 33 of the Evidence Act, and being in the nature of admissions in Vaman's

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own interest, cannot be used in his favour, nor in favour of the plaintiff, who claims through him—Evidence Act, Section 21. This principle is recognized by the Privy Council in *Adbul Hye* v. *Mir Mohammed* (*supra*), where at page 623 of the report their Lordships say: "Their Lordships have considered these questions quite irrespective of the statements or declarations made by Abdul *post litem motam* in the litigation between him and Ahmed, and where his object was to defeat his own deed."

The circumstance that a voluntary family settlement like this is without consideration, other than the covenant to provide Vaman with maintenance while he lived in the family house and Rs. 15 per mensem if he was not satisfied with the maintenance provided for him, does not, I think, afford any evidence that it was not the intention of Vaman and Subhadrabai that the release should be acted on. It might be otherwise if a pretended consideration had been stated in the deed, but when the true reason for the deed is set forth in its language it is impossible I think to say that the absence of consideration affords any clue to the intention of the parties to the release or proof of an intention inconsistent with the purport of the deed. The evidence of such intention or absence of intention must be sought, therefore, wholly in the extent to which the release was acted upon. It is pointed out by the Subordinate Judge that before the date of the release the documents relating to the management of the estate were taken in the name of Vaman. It is not disputed that after the release the large majority of documents—more than 100 I believe have been put in—relating to such management were taken in favour of the minor represented by Subhadrabai and that suits also were filed and decrees were executed in the name of the minor. (His Lordship examined the evidence and continued:—)

The question is, whether under these circumstances there was evidence of the sham nature of the release. We must be careful not to outstep our duty as a Court of second appeal or to overrule the Judge on a question of this kind if there was evidence upon which he could judicially arrive at the conclusion he came to. The intention of the parties to the release is a question of fact and the lower appellate Court is the constitutional tribunal to decide such questions. This Court cannot interfere if there is

is apparent from the language of the deed itself and the absence of any reliable evidence that Subhadrabai defrayed any debts out of her own pocket. The allowance of Rs. 15 per mensem was a reservation out of the estate, and no one undertook any personal responsibility for it. The question of intention is one of fact in regard to which this Court cannot on second appeal do otherwise than accept the finding of the First Class Subordinate Judge. The lower appellate Court was aware that a number of documents were drawn up in Sadashiv's name, but looking to the conduct of the parties and the circumstances of the case, came to the conclusion that the transaction was merely colourable. This decision seems to me to be binding on the Court, for the First Class Subordinate Judge does not appear to have overlooked any evidence or to have been under any misapprehension as to the law applicable to the subject. The law is clearly laid down in *Tillakchand* v. *Jitamal* (1) as follows:—"But if the sale or mortgage be only a colourable transaction, or a mere sham, and not intended to confer upon the alleged grantee or mortgagee any beneficial interest in the property, and simply (for the purpose of screening it from execution) to substitute such grantee or mortgagee as nominal owner in lieu of the real owner (the debtor), and to make such nominal owner nothing more than trustee for the real owner (the debtor), and thus to endeavour to preserve the property for the latter, such a sale or mortgage would be invalid as against the creditor and he would be entitled to attach and sell the property." Possibly in such a case the real reason may be that no property passes, because none is intended to pass. See the extract from Bracton quoted at the end of Pollock on Contracts. "*Item non valet donatio nisi tam dantis quam accipientis concurrat mutuus consensus et voluntas, scilicet quod donator habeat animum donandi et donatarius animum recipiendi.*" But however this may be, there is, I think, sufficient authority for the view of the law taken by the First Class Subordinate Judge.

I am, therefore, of opinion that the decree should be confirmed with costs both in this case and in Second Appeals Nos. 704 and 705 of 1896.

(1) 1873) 10 Bom. H. C. Rep. 206 at p. 210.

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The Judges having thus differed in opinion, the appeal was referred, under section 575 of the Civil Procedure Code (Act XIV of 1882), to Farran, C. J. He agreed with Ranade, J, upon the first two of the questions above stated, but upon the third he held that there was evidence upon the record upon which the lower appellate Court was entitled to hold that the release had not been ratified He agreed, therefore, with Fulton, J., that the decree for the plaintiff passed by the lower Court should be confirmed

The following are the arguments and judgment on the reference:—

Branson (with *Mahadev R. Bodas*), for the appellant (defendant):—The lower appellate Court has given the plaintiff a decree and has held the property in question to be liable in execution of his decree against Vaman, on the grounds that the release was a sham, and that Vaman did not ratify it after attaining majority, but on the contrary repudiated it. As to the first point, we deny the release was a sham or that it was in fraud of creditors. All the then existing creditors were paid off, and full publicity was given to the transaction—*In re Johnson* (1); *Gnanabhai* v. *Srinivas* (2). No new debts were incurred until 1891. It was in the nature of a family settlement. A subsequent creditor is not entitled to impeach it. Fulton, J., has held that Vaman being a minor was incompetent to execute a release which implies a contract. The release here was in the nature of a grant and a grant does not necessarily imply an antecedent contract. This is the case of a gift by a minor father to his minor son which can be ratified by the father on attaining majority—Simpson on Infants, pp. 5, 9, 22, 26, 46, 48 and 182. But, even regarding this as a case of contract we contend that a minor's incompetency to contract does not make his contract void, but only voidable, and it may be ratified by him on his attaining majority—*Mahamed Arif* v. *Saraswati* (3). Vaman ratified this release after he attained majority. His statements in the certificate proceedings in 1891 repudiating the release are not evidence. They were statements made in his own interest and cannot be used by the plaintiff who claims through him. Up to 1891 Vaman gave full effect to the release, which was duly registered.

(1) (1881) 20 Ch. D, 389. (2) (1868) 4 Mad H. C. Rep., 84.
(3) (1891) 18 Cal., 259.

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Robertson (with *N. G. Chandavarkar*), for the respondent (plaintiff) :—The finding of the lower Court that the release was a sham, and was never intended to be operative except as against creditors, is binding on this Court in second appeal—*Ramratan* v. *Nandu*[1]. Soon after Vaman came of age he asserted his right to the property and in 1891 he repudiated the release in the certificate proceedings. His statements there are admissible under section 33 of the Evidence Act (I of 1872).

Under Indian law the contract of a minor is not voidable but is absolutely void—*Fatima Bibi* v. *Debnauth* [2]. Only those who are of age can contract—Contract Act (IX of 1872), Secs. 10 and 11. See also section 3 of the Registration Act (III of 1877), which forbids registration of a document executed by a minor. If the release, then, was a contract, it was void. Further, there was no consideration for it. It was not love and affection under section 25 of the Contract Act (IX of 1872), for Vaman's object was to protect himself—*Vasudeo Bhat* v. *Venkatesh* [3]. If a trust, it was invalid under section 7 of the Indian Trust Act (II of 1882). If it was a gift, it was a gift by a minor of his whole property, which is invalid—*Hearle* v. *Greenbank*[4]; Simpson on Infants, p. 5; Trevelyan's Law of Minors, p. 272; Strange's Hindu Law, Vol. I, p. 271. See also *Appa Pillai* v. *Ranga Pillai*[5].

Branson in reply :—The payment of Vaman's debts out of the family estate was a sufficient consideration for the release or the undertaking by Vaman's sister to pay Rs. 15 a month to Vaman —*Bithál Das* v. *Shankar* [6]; *Mantappa* v. *Baswantrao*[7].

FARRAN, C. J.:—The learned Judges who heard this second appeal having differed in opinion as to the decree which should be passed upon it, the appeal has been referred to me under section 575 of the Civil Procedure Code. Counsel have been heard and I now proceed to give my judgment upon the several questions which are involved in the reference. In order to define with precision what these questions are, I briefly state the general facts of the case.

(1) (1891) 19 Cal., 249.
(2) (1893) 20 Cal., 508.
(3) (1878) 10 Bom. H. C. Rep., 139.
(4) 3 Atk. Rep., 712.
(5) (1882) 6 Mad., 71.
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The suit was brought by a creditor of Vaman Sadashiv seeking a declaration that certain property which he had attached was the property of Vaman. On the 12th October, 1887, Vaman had executed an instrument, styled a release, in favour of his minor son Sadashiv Vaman, represented by the minor's aunt Subhadrabai *alias* Savitribai. Vaman was her adopted brother much younger than she. The release states that the whole of the property moveable and immoveable, which had descended from Vaman's (adoptive) father Sadashiv Vinayak, had been in Vaman's possession and charge after his mother's death, and goes on to release Vaman's interest in the same in favour of his minor son Sadashiv. The operative parts of the instrument run as follows. (His Lordship read the passage above set forth (p. 148) and continued:—) The Judge in appeal differing from the Court of first instance has come to the conclusion that Vaman was less than 21 years old when he executed the release. He does not find definitely what Vaman's exact age then was, but he states that the evidence, which he considers reliable, shows that Vaman was born in 1868. Vaman was thus at least 19 years of age when he executed the release, but he was, in law, a minor. His adoptive mother, who subsequently died, had been appointed guardian of his person and to administer his estate. The referring Judges are agreed that Vaman was, in law, a minor when he executed the release. They differ as to whether under the circumstances of the case the attaching creditor is bound by the release.

The questions which present themselves as calling for solution are:—

(1) Whether in second appeal we can hold that the lower appellate Court was wrong, in law, in finding that the release represented a colourable transaction, and is ineffectual to exempt the property in suit (which was comprised in the release) from attachment and sale at the instance of the plaintiff? The plaintiff's debt was incurred by Vaman long subsequent to the release.

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I have stated the questions in the above order, because, if the release was invalid in its inception, the other questions need not be considered; and also because I desire to keep distinct the first and third questions, though the facts which it is necessary to refer to in order to determine them, are in some instances the same.

Now as to the first question, the execution of the deed being admitted, and it having been registered, the burden of proving that it is invalid lies, I think, upon the plaintiff. Certainly the burden of proving that it was not real, lies upon him—*Sham Chand* v. *Protap Chandra*[1]. I do not say that he need bring forward direct proof that the release was unreal, or that it was fraudulent, but he must prove circumstances from which the unreality of the release, or its fraudulent character, may be legitimately inferred. It is not alleged in this case that the release was obtained by means of fraud or of undue influence exercised over Vaman by his sister Subhadrabai, nor do I think that it would be open to an attaching creditor to impeach it upon that ground. The plaintiff can only succeed by showing (*a*) that the release was made in favour of Sadashiv with the intent of actually conveying the share of Vaman to Sadashiv, but with the further intent to delay, hinder and defraud Vaman's creditors within the meaning of the Statute of Elizabeth, or (*b*) that it was, as Mr. Justice Fulton calls it, a mere pocket instrument, not intended to operate according to its tenor and effect, by which the property was put in the name of Sadashiv for the benefit of Vaman—a mere *benami* transaction. The English cases where real estate or chattels real are concerned, deal almost exclusively with the former class of fraudulent or unreal conveyances. Indeed, it may, I think, be questioned whether under English law a conveyance of real estate when delivered to the grantee does not always, where no fraud has been practised on the grantor, operate to transfer the property in the land, the subject of the conveyance, from the grantor to the grantee, though there may exist a secret trust in favour of the former giving him a right

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It was not contended in the argument before me, nor, so far as I can see throughout the case, that the instrument in question was of the former class. The circumstances that the then existing debts of Vaman were all paid off by Subhadrabai at or about the time when the release was executed and as part of the same transaction; that the release was registered and publicly notified throughout the district; that its openly avowed object expressed in the instrument itself was to protect the ancestral estate from the consequences of Vaman's imprudence and extravagant habits, preclude the idea that, *if intended to be operative between the parties to it as a release*, it was executed for the purpose of defeating, hindering or defrauding creditors. See the judgment of Mr. Justice Fry in *In re Johnson*[3].

The judgment of the lower appellate Court did not, however, I think, proceed upon the ground that the release was fraudulent within the spirit of the Statute of Elizabeth, but upon the footing that it was a colourable instrument not intended to operate as a release or to convey Vaman's share in the estate to Sadashiv or to divest Vaman of his co-parcenery rights in the property. This was the form in which the issue was raised in the lower appellate Court and this was the issue which that Court decided in favour of the plaintiff.

Upon this part of the case Mr. Justice Ranade considers "that the lower appellate Court did not correctly apprehend the true nature of the release transaction" and "that both the grounds on which the lower Court of appeal has relied, namely, the absence of consideration and prejudice to prospective creditors in support of its

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Though the learned Judges appear, at first sight, to have thus approached the consideration of the appeal from somewhat different points of view, I think that it is not really so. Mr. Justice Fulton admits, in the opening paragraph of his judgment, that 'if the intention of Vaman was to pass a real and not a sham document, no case of fraud would arise'—the release would be good as a voluntary conveyance—but thinks that there is evidence upon which the lower appellate Court could find that the release was a sham: while Mr. Justice Ranade considers that the lower appellate Court ought, upon the evidence, to have come to the conclusion that the release was a *bonâ fide* voluntary conveyance, thus in effect holding that there was, in his opinion, no evidence which could support the finding that the release was colourable.

The question, therefore, narrows itself to this: Is there evidence in the case upon which the lower appellate Court's finding can be supported? In my opinion, there is not. The *onus* of proving that the instrument was colourable, rests, as I have shown, upon the plaintiff. I have already adverted to the publicity of the transaction and the payment of all Vaman's debts and the consequent clearing of the estate from all liability. It is not denied that the release was delivered to Subhadrabai and duly registered. There is nothing, therefore, in the circumstances connected with the transaction itself which can cast any doubt upon its reality. The evidence given by Vaman in the certificate proceedings in 1891 must be left out of consideration upon this part of the case. It is not evidence under section 33 of the Evidence Act, and being in the nature of admissions in Vaman's

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The circumstance that a voluntary family settlement like this is without consideration, other than the covenant to provide Vaman with maintenance while he lived in the family house and Rs. 15 per mensem if he was not satisfied with the maintenance provided for him, does not, I think, afford any evidence that it was not the intention of Vaman and Subhadrabai that the release should be acted on. It might be otherwise if a pretended consideration had been stated in the deed, but when the true reason for the deed is set forth in its language it is impossible I think to say that the absence of consideration affords any clue to the intention of the parties to the release or proof of an intention inconsistent with the purport of the deed. The evidence of such intention or absence of intention must be sought, therefore, wholly in the extent to which the release was acted upon. It is pointed out by the Subordinate Judge that before the date of the release the documents relating to the management of the estate were taken in the name of Vaman. It is not disputed that after the release the large majority of documents—more than 100 I believe have been put in—relating to such management were taken in favour of the minor represented by Subhadrabai and that suits also were filed and decrees were executed in the name of the minor. (His Lordship examined the evidence and continued:—)

"The question is, whether under these circumstances there was evidence of the sham nature of the release. We must be careful not to outstep our duty as a Court of second appeal or to overrule the Judge on a question of this kind if there was evidence upon which he could judicially arrive at the conclusion he came to. The intention of the parties to the release is a question of fact and the lower appellate Court is the constitutional tribunal to decide such questions. This Court cannot interfere if there is

liability to pay Rs. 30, but no more. The writer says he will positively pay the Rs. 30, because he is bound as a son to do so. But there is no acknowledgment of any other existing liability. In any case, therefore, there is no ground for our interference.

Rule discharged.

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MADHAVRAV v. GULABBHAI.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

MAHADEO CHINTAMAN WADEKAR (ORIGINAL APPLICANT), APPLICANT, *v.* RAO BAHA'DUR VASUDEV J. KIRTIKAR (ORIGINAL AUCTION-PURCHASER), OPPONENT.*

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Civil Procedure Code (Act XIV of 1882), *Sec.* 310 A [1]—*Right to apply under the section—Ownership of land—Vendor and purchaser—Effect of contract of sale—Transfer of Property Act (IV of* 1882), *Sec.* 54.

A person who has contracted to purchase land, or an interest in land, does not by such contract become the owner, in equity, of such land or such interest (section 54 of the Transfer of Property Act IV of 1882). He has a personal right against his vendor or the assignee with notice of his vendor to compel the latter by a suit for specific performance to perform his contract: but he has no direct right over the land.

Held, accordingly, that a person who had contracted to purchase certain land which was subject to mortgage, and was sold in execution by the mortgagee, was

*Civil Application No. 270 of 1897 under extraordinary jurisdiction.

(1) Section 310A, Civil Procedure Code (Act XIV of 1882) :—

"Any person whose immoveable property has been sold under this chapter may at any time within thirty days of sale apply to have the sale set aside on his depositing in Court (*a*), for payment to the purchaser, a sum equal to five per centum of the purchase money, and (*b*) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

"If such deposit is made within the thirty days, the Court shall pass an order setting aside the sale.

'Provided that, if a person applies under the next following section to set aside the sale of his immoveable property, he shall not be entitled to make an application under this section.

"Nothing in this section shall be construed to relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale."

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not the owner of the land and was, therefore, not entitled to apply to set aside the sale under section 310A of the Civil Procedure Code (Act XIV of 1882).

APPLICATION under the extraordinary jurisdiction of the High Court (Civil Procedure Code, Act XIV of 1882, section 622) against the decision of Ráo Saheb G. K. Kanekar, Subordinate Judge of Vadgaon in the Poona District.

Application under section 310A of the Civil Procedure Code (Act XIV of 1882) to set aside a sale in execution.

The sale in question took place on the 17th October, 1896, in execution of a mortgage decree obtained by one Sadaram Ramchandra against Dinaji Moroba. At the sale the opponent (Ráo Bahádur Vasudev J. Kirtikar) bought the property.

Subsequently the present applicant (Mahadeo Chintaman) applied to the Subordinate Judge under section 310A of the Civil Procedure Code to set aside the sale, alleging that on the 16th May, 1895, Dinaji Moroba had sold the property, subject to the mortgage, to his (the applicant's) daughter Mothibai, and that Mothibai had afterwards by a registered agreement, dated 28th August, 1896, contracted to sell it to him for Rs. 2,200, of which he had paid a part as earnest-money.

The Subordinate Judge rejected the application, holding that the applicant had no *locus standi* to apply under section 310A.

The applicant applied to the High Court in its extraordinary jurisdiction and obtained a rule *nisi* calling on the opponent to show cause why the order of the Subordinate Judge should not be set aside.

Anderson with *Narayan V. Gokhale* for the applicant in support of the rule:—The applicant is entitled to apply under the section. From the marginal note it would seem as if the benefit of the section was exclusively for judgment-debtors. But the marginal notes cannot limit or affect the express words of the section any more than illustrations—*Koylash Chunder* v. *Sonatun*[1] or a preamble—*Queen Empress* v. *Indaji*[2]. As to the meaning of the words "any person" in the next section 311, see *Asmut-un-Nissa* v. *Ashruff Ali*[3]; *Sheo Prasad* v.

(1) (1881) 7 Cal., 132. (2) (1889) 11 All., 262.
(3) (1888) 15 Cal., 488.

Hira Lal v. *Kali Kant Chunder*[1]; *Kalli Prosad Chunder* v. *Dwarka Nath*[2]. We have bought the property and the opponent purchased it with notice of our contract. He is, therefore, a trustee for us—Indian Trusts Act (II of 1882) Sec. 91.

Branson and *Inverarity* (with *V. G. Bhandarkar* and *R. V. Desai*), for the opponent, showed cause:—The rights given by section 310A are given only to judgment-debtors and the applicant is not a judgment-debtor—*In the matter of the petition of Bhagbuti Churn*[3]. Section 54 of the Transfer of Property Act (IV of 1882) provides that a contract for sale does not of itself create any interest in or charge on property. A buyer may have a charge as against his vendor under section 55 of the Transfer of Property Act, but such a charge cannot affect the property itself which by the sale in execution passed to the purchaser free of incumbrance.

FARRAN, C. J.:—We are of opinion that the view of the Subordinate Judge is correct and that the applicant who contracted to purchase the interest of Mothibai in the land, which interest consisted of a right to redeem the mortgage upon it, is not the owner of the land within the meaning of section 310A of the Civil Procedure Code.

The Transfer of Property Act, section 54, provides "that a contract for the sale of immoveable property * * * does not, of itself, create any interest in or charge on such property." Having regard to that specific provision of the law, we cannot give effect to the argument based on varying decisions of Courts of Equity in England—as to the result of which the decision in *Rayner* v. *Preston*[4] may be consulted—or on an inference to be derived from illustrations (*g*) and (*h*) to section 3 of the Specific Relief Act, to which may be added section 91 of the Indian Trusts Act, that a person who has contracted to purchase land or an interest in land is the owner, in equity, of such land or of such interest therein. He has a personal right against his vendor or the assignee with notice of his vendor to compel the latter by a suit for specific performance to perform his contract: but he has no direct right over the land. We also think that because

(1) (1889) 12 All., 440.
(2) (1886) 13 Cal., 346.
(3) (1882) 8 Cal., 367.
(4) (1881) 18 Ch. Div., 1.

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MAHADEO v. VASUDEV J. KIRTIKAR.

the applicant has paid a small sum as earnest-money when entering into the contract, he cannot be treated as the owner of the land within the meaning of the section. Assuming that under section 55 of the Transfer of Property Act the applicant as against his vendor has a lien or charge upon the subject-matter of his purchase for the earnest that he has paid, and that a person holding a simple lien over immoveable property is *pro tanto* the owner of such property within the meaning of section 310A—the inclination of our opinion is to the contrary view—we cannot think that the applicant can be said to be owner of even the interest over which his lien extends. The lien or charge which the section gives him is, at the most, a contingent lien which will only become absolute if he is ready and willing to perform his contract when the time for performance arrives, or if he properly declines to perform it. Neither of the cases cited in argument—*Rakhal Chunder* v. *Dwarkanath* (1) and *Bhagabuti Churn* v. *Bishesuar Sen*(2)—though they are useful as analogies, covers the present case.

Rule discharged with costs.

Rule discharged.

(1) (1886) 13 Cal., 316. (2) (1882) 8 Cal, 367.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898. *March* 14.

MURARRAO AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1, 2), APPELLANTS, *v.* SITARAM AND ANOTHER (ORIGINAL DEFENDANTS NOS. 16, 17), RESPONDENTS.*

Partition—Suit for partition by a purchaser from a co-sharer—Decree in such suit need not be for a general partition of the entire estate—Practice.

When a purchaser from a co-sharer in a joint family estate sues to have his share severed and given to him, the Court is not bound to force the members of the family into a partition of the whole estate. It is, no doubt, open for each and every co-sharer to ask to have his share divided off and allotted to him (in which case he would have to pay court-fees according to his share). But, in the absence of such a request, the Court is not bound to determine what is the share of each of the co-sharers, and to compel him to take that share by making a general partition.

* Cross Second Appeals, Nos. 1041 and 1042 of 1897.

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In such a case the High Court refused, in second appeal, to accede to the prayer of some of the co-sharers, who had not appeared in the Court of first instance, to have their shares divided off and allotted to them.

SECOND appeal from the decision of Ráo Bahádur Thakurdas M., Assistant Judge of Ratnágiri.

Suit for partition. One Zimaji Jaising was the owner of a 16-pies' share in the property in dispute. In 1865 he sold his share to Kashinath Shivram.

Out of this share Kashinath sold an 8-pies' share to plaintiff in 1884, and the remaining 8-pies' share to defendants Nos. 1 to 4.

In 1894 plaintiff filed the present suit to recover by partition the 8-pies' share he had bought from Kashinath.

Defendants Nos. 1 and 2 did not appear. Defendants Nos. 3 and 4 claimed to be the owners of the whole 8-pies' share purchased from Kashinath, and denied that defendants Nos. 1 and 2 had any interest in that share. They further stated that they had mortgaged with possession the whole of this 8-pies' share to defendants Nos. 16 and 17, that they had no objection to the plaintiffs' receiving his 8-pies' share by partition, and they prayed that their own 8-pies' share should be divided into two sub-sharers of 4 pies each, one to be awarded to each of them after the mortgage-debt was satisfied.

Defendants Nos. 5 to 15 were made parties to the suit as they were co-sharers in the rest of the family property.

The Court of first instance raised (*inter alia*) the following issue :—

Fifth Issue.—"Whether defendants Nos. 3 and 4 have an 8-pies' share, and whether the said share can be partitioned and retained in the possession of defendants Nos. 16 and 17 as mortgagees until their mortgages are redeemed."

On this issue the Court found that out of the 8-pies' share sold by Kashinath to defendants Nos. 1 to 4, defendants Nos. 1 and 2 were entitled to a 4-pies' share, and defendants Nos. 3 and 4 to the remaining 4-pies' share; and that defendants Nos. 3 and 4 had no right to mortgage the entire 8-pies' share to defendants Nos. 16 and 17.

The Court, therefore, passed a decree for partition, awarding an 8-pies' share to plaintiff, and a 4-pies' share to defendants

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MURARRAO v. SITARAM.

Nos. 3 and 4, and directing that this 4-pies' share should be retained by the defendants Nos. 16 and 17 until their mortgage-debt was satisfied. With respect to the 4-pies' share found to belong to defendants Nos. 1 and 2, no order was passed, as those defendants were not before the Court.

Against this decision defendants Nos. 16 and 17 (the mortgagees) alone appealed to the District Court, contending that their mortgagors (defendants Nos. 3 and 4) were owners not merely of a 4-pies' share, but of the entire 8-pies' share purchased from Kashinath, and that the fifth issue raised by the first Court was not necessary for the decision of the case.

The Assistant Judge disallowed this contention and confirmed the decree of the first Court.

Against this decision defendants Nos. 16 and 17 preferred a second appeal (No. 1042 of 1897) to the High Court. Defendants Nos. 1 and 2 also filed a separate second appeal (No. 1041 of 1897), and contended that the share found to be theirs by the lower Court ought to be decided and allotted to them.

Daji Abaji Khare for appellants—*Vasudev Gopal Bhandarkar* for respondents—in Appeal No. 1041 of 1897.

Vasudev Gopal Bhandarkar for appellants (there was no appearance for respondents) in Appeal No. 1042 of 1898.

PARSONS, J.:—We do not think that we ought now in second appeal to assent to the prayer of the defendants Nos. 1 and 2 and give them a 4-pies' share in this property to be divided off and allotted to them.

The plaintiff brought the suit as a purchaser to obtain, by partition, the share he had purchased. He valued his claim at the value of that share and paid court-fees on that value. It was, no doubt, open for each and every one of the defendants (who represented the family) to have asked to have his share divided off and allotted to him, in which case he would have had to pay court-fees according to his claim, but we do not think that it was compulsory on him to have done so, still less do we think that the Court was bound in such a suit as the present, in the absence of any such request, to have determined what was the share of

each of the defendants, and to have allotted him that share and compelled him to take it by making a general partition. No doubt there are remarks in *Harkisandas Kashidas* v. *Nagardas*[1], which favour a contrary view, but they must be taken to apply to that particular case only. We see no reason why, when a purchaser wants to have the share in a family estate that he has bought divided off and given to him, the members of the family should be forced into a partition of the whole family estate.

In the present case the defendants Nos. 1 and 2 did not appear in the Court of first instance, they did not contest the fifth issue which related to the share of the defendants Nos. 3 and 4 only, and they did not appeal against the decree which allotted them no share. They want now to take advantage of the finding on that fifth issue, since it is said to have decided in their favour that they own a 4-pies' share, which the defendants Nos. 3 and 4 had no power to mortgage to the defendants Nos. 16 and 17. As a matter of fact, however, there is no such finding on that issue which can bind the parties to this second appeal. The decision said to have been arrived at is not the actual finding, though it may be the result of the finding; the finding itself is only as to the share of the defendants Nos. 3 and 4, and we could not possibly accept it as binding upon the defendants Nos. 16 and 17, since there are no certain reasons given for it but only vague suppositions, and the 4-pies' share has been ordered to remain with the defendants Nos. 16 and 17 as it is at present, until the mortgage is paid off.

All really that the Court had to do in a suit like the present was to have determined the shares in dispute, *i. e.*, the share of the plaintiff and the shares of the defendants who claimed a share and asked for that share to be allotted to them by partition, there was no dispute between the defendants Nos. 1 and 2 and the defendants Nos. 3 and 4 *inter se* as to their respective shares, and the issue, if it be extended so as to embrace the double question whether the defendants Nos. 3 and 4 had an 8-pies' share, or whether they had only a 4-pies' share, the other 4-pies share being owned by the defendants Nos. 1 and 2, was as to

(1) P. J., 1876, p. 10.

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the latter part unnecessary. Still more unnecessary was it to go into the question of the validity of the mortgage of the whole 8-pies' share by the defendants Nos. 3 and 4 to the defendants Nos. 16 and 17.

While, therefore, we confirm the decree, we must reverse the finding as to a 4-pies' and not an 8-pies' share being with the defendants Nos. 16 and 17 in right of mortgage and leave the parties to their civil rights, unfettered by any finding or order of possession in respect of the mortgage. We order each party to bear his own costs in this Court.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr Justice Ranade.

1898.
March 15.

ABDUL KADAR (ORIGINAL DEFENDANT) *v.* BAPUBHAI AND OTHERS (ORIGINAL PLAINTIFFS, &c.) RESPONDENTS*

Mahomedan law—Joint property—Partition—Suit for share of such property—Share allotted to defendant in same suit on payment of court-fees—Practice—Procedure.

In the Presidency of Bombay a suit for partition of an inheritance by Mahomedans is hardly distinguishable from a partition suit by Hindus. In such a suit, if a defendant asks at the proper time to have his share divided off and allotted to him, such relief should be granted to him on payment of the necessary court fees.

SECOND appeal from decision of G. C. Whitworth, District Judge of Ahmednagar.

The parties to the suit were Mahomedans. Their common ancestor was one Mahomed Shafi. He had four sons—Kadar, Sale, Fazal and Futte Mahomed.

The plaintiffs were the grandsons of the third son Fazal. Defendant No. 1 was the grandson of the fourth son Futte Mahomed and defendants Nos. 2 and 3 were the great-grandsons of the second son Sale. The first son Kadar left no issue.

The lands in dispute were inám lands, which had been acquired by the family during the period of Mahomedan rule.

* Second Appeal, No. 954 of 1896.

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ABDUL KADAR v. BAPUBHAI.

Plaintiffs alleged that a third share of the lands belonged to them, a third to defendant No. 1 and a third to defendants Nos. 2 and 3, and that until 1883 the income had been divided between them according to their respective shares.

In 1893 the plaintiffs filed the present suit to recover their share of the lands by partition together with mesne profits for three years preceding suit.

The plaintiffs valued the suit and paid court-fees sufficient to cover their one-third share in the property.

The first defendant prayed that he too should be given his third share, and contended that, unless that was done, the plaintiffs were not entitled to their third share.

The Subordinate Judge passed a decree awarding the plaintiffs their third share, but he refused in this suit to give the first defendant his share, on the ground that the court-fees which had been paid only covered the plaintiffs' share. He held that the suit was not one for partition, but for separation of the plaintiffs' share which had been already ascertained and that the first defendant should bring a separate suit to recover his share. In his judgment he said :—

"The suit is valued and court-fee paid only sufficient to cover plaintiffs' one-third share of the property. The suit is not for partition of joint family property. The shares have been ascertained since a long time before, and the parties have been receiving income of their shares accordingly, though no division by metes and bounds is yet made. Plaintiffs claim such separation of their share, and that is awarded to them If defendant No. 1 wishes to have his share also given in his possession separately, he may bring a separate suit for that purpose."

This decision was confirmed, on appeal, by the District Judge. His reasons were as follow :—

"This is not a suit for partition of joint family property as known to the Hindu law, but a suit by Mussalmans for their share of an inheritance. It was not, I think, incumbent on the Subordinate Judge in such a case to direct separation of any defendant's share."

Against this decision defendant No. 1 preferred a second appeal to the High Court.

N. G. Chandavarkar, for appellant.

Shripad Khanderao, for respondent.

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the latter part unnecessary. Still more unnecessary was it to go into the question of the validity of the mortgage of the whole 8-pies' share by the defendants Nos. 3 and 4 to the defendants Nos. 16 and 17.

While, therefore, we confirm the decree, we must reverse the finding as to a 4-pies' and not an 8-pies' share being with the defendants Nos. 16 and 17 in right of mortgage and leave the parties to their civil rights, unfettered by any finding or order of possession in respect of the mortgage. We order each party to bear his own costs in this Court.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898.
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The plaintiffs valued the suit and paid court-fees sufficient to cover their one-third share in the property.

The first defendant prayed that he too should be given his third share, and contended that, unless that was done, the plaintiffs were not entitled to their third share.

The Subordinate Judge passed a decree awarding the plaintiffs their third share, but he refused in this suit to give the first defendant his share, on the ground that the court-fees which had been paid only covered the plaintiffs' share. He held that the suit was not one for partition, but for separation of the plaintiffs' share which had been already ascertained and that the first defendant should bring a separate suit to recover his share. In his judgment he said :—

"The suit is valued and court-fee paid only sufficient to cover plaintiffs' one-third share of the property. The suit is not for partition of joint family property. The shares have been ascertained since a long time before, and the parties have been receiving income of their shares accordingly, though no division by metes and bounds is yet made. Plaintiffs claim such separation of their share, and that is awarded to them. If defendant No. 1 wishes to have his share also given in his possession separately, he may bring a separate suit for that purpose."

This decision was confirmed, on appeal, by the District Judge. His reasons were as follow :—

"This is not a suit for partition of joint family property as known to the Hindu law, but a suit by Mussalmans for their share of an inheritance. It was not, I think, incumbent on the Subordinate Judge in such a case to direct separation of any defendant's share."

Against this decision defendant No. 1 preferred a second appeal to the High Court.

N. G. Chandavarkar, for appellant.

Shripad Khanderao, for respondent.

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PARSONS, J.:—This is the converse of the case *Murarrao* v. *Sitaram* [1] we decided yesterday, because in this suit for partition of joint property the Courts have refused to give the first defendant his share, which was found and is now admitted to be one-third, though he asked for it. The reason assigned for the refusal by the Subordinate Judge is that the court-fee paid is only sufficient to cover plaintiffs' one-third share in the property. No more, however, is ever paid in any suit for partition, and we think that it was quite in the power of the Judge to have ordered the defendant to pay the necessary court-fee on his share as a condition precedent to his obtaining his share.

The District Judge refused because this was not a suit for partition of joint family property as known to the Hindu law, but a suit by Musalmans for their share of an inheritance. In this Presidency, however, a suit for partition of an inheritance by Musalmans is hardly distinguishable from a partition suit by Hindus, and the Subordinate Judge has declared the property to be the joint property of the parties, so that the principles of an ordinary administration suit ought, at any rate, to be applied to it. It is obviously most undesirable that parties should be driven to further litigation to obtain a relief which they are entitled to, and ask for at a proper time, and which can be given to them in an existing suit.

We vary the decree by awarding the appellant his one-third share to be ascertained and divided off and given to him in execution on payment of the necessary court-fees, *viz.*, Rs 47-4-0, being made by him into Court within such time as the Court of first instance directs. We make no order as to any costs in this Court.

(1) See *ante* p 184.

ORIGINAL CIVIL.

Before Mr. Justice Fulton, on appeal before Sir C. Farran, Kt., Chief Justice, and Mr. Justice B. Tyabji.

ALAMAI, PLAINTIFF, *v.* POSITIVE GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LIMITED, DEFENDANTS *

1898.
February 15, 17, 18, 22
On appeal, *August* 12

Insurance—Life insurance—Insurance effected by one person on the life of another in whose life he has no interest—Wager—Contract Act (IX of 1872), Sec. 30—Stat. 14 Geo. III, c. 48—Stat. 8 and 9 Vict., c. 106—Assignment of life policy to a stranger without interest in the life insured.

The defendant company issued a policy for a term of ten years for Rs. 25,000 on the 23rd August, 1894, on the life of Mehbub Bi, the wife of one Abdul Samad, who was a clerk in the employment of one Nasarwanji F. Bhandara, a barrister practising at Hyderabad. On the 1st September, 1894, Mehbub Bi assigned the policy to the plaintiff Alamai, who was the wife of Nasarwanji F. Bhandara. On the 2nd October, 1894, Mehbub Bi died. The plaintiff as assignee of the policy brought this suit to recover Rs. 25,000 from the defendants. The defendants (*inter alia*) contended that the policy had really been effected, not by Mehbub Bi or for her use or benefit or on her account, but by the said Nasarwanji F. Bhandara for his own use and benefit, and that he had no interest in the life of Mehbub Bi, and that, therefore, the policy was void.

Held (1) on the evidence that the policy had not been effected by Mehbub Bi, or for her use and benefit, but had been effected by Nasarwanji F. Bhandara for his own use and benefit, and that he had no interest in the life of Mehbub Bi.

(2) That in India an insurance for a term of years on the life of a person in which the insurer has no interest, is void as a wagering contract under section 30 of the Contract Act (IX of 1872), and that, therefore, the policy sued on was void.

Quære—Whether an assignment of a life policy to a stranger having no interest in the life of the insured is void?

SUIT by the plaintiff as assignee of a policy of life insurance to recover the amount of the policy (Rs. 25,000) from the defendants.

The policy in question was dated the 23rd August, 1894, and was granted in Bombay by the defendants to one Mehbub Bi, the wife of one Munshi Abdul Samad of Hyderabad in the Deccan. It insured her life for a period of ten years for Rs. 25,000.

* Suit No. 237 of 1895. (Appeal No. 978.)

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On the 1st September, 1894, Mehbub Bi assigned the said policy to the plaintiff Alamai.

On the 2nd October, 1894, Mehbub Bi died.

This suit was filed in April, 1895.

The husband of the plaintiff Alamai was one Nasarwanji Framji Bhandara, a barrister practising at Hyderabad. The above-mentioned Abdul Samad (the husband of the insured Mehbub Bi) was in his service as his munshi or clerk.

The defendants in their written statement denied that the policy was effected by Mehbub Bi or for her use or benefit or on her account, and alleged that it was effected by the said Bhandara (the plaintiff's husband) in the name of Mehbub Bi for his own use and benefit, and that he had no interest in the life of Mehbub Bi, and they contended that the policy was, therefore, void. They also alleged that the policy was obtained by fraudulent misrepresentations, *viz.*, (1) that it was effected by the said Mehbub Bi, (2) as to the age of Mehbub Bi, (3) as to the means and circumstances of Mehbub Bi and her husband Abdul Samad.

The defendants did not admit the alleged assignment of the policy to the plaintiff, and further contended that, if made, it was without consideration, and was made for the use and benefit of the said Bhandara (plaintiff's husband), and that the plaintiff could not sue upon the said policy.

The last clause of the written statement was as follows :—

"12. By the terms of the said policy, in the event of the death of the assured occurring in any year before the full amount of the year's premium should have been paid, the amount required to complete the year's premium would be deducted from the sum assured; only two months' premium was paid in respect of the said policy, and, if the plaintiff is held entitled to recover in this suit, the defendants claim the deduction of Rs. 402 8-0, the amount of 10 months' premium under the said policy."

The following issues were raised at the hearing :—

1. Whether the policy in the plaint mentioned was effected by Mehbub Bi, or for her use and benefit, or on her account?

2. Whether the said policy was not effected by Nasarwanji Framji Bhandara, the husband of plaintiff, and for the use and benefit of the said Nasarwanji?

3. Whether the said Nasarwanji had any interest in the life of the said Mehbub Bi?

4. Whether the said policy is not void as a wagering transaction?

5 Whether the said policy was not obtained by means of fraudulent misrepresentations as to the means and the circumstances of the said Mehbub Bi and her husband Abdul Samad?

6. Whether the said policy is not void by reason of such fraudulent misrepresentations?

7. Whether the said policy was not obtained by the fraudulent representation that it was effected by the said Mehbub Bi and for her use and benefit, whereas it was effected by the said Nasarwanji, not for her use and benefit but for his own?

8. Whether by reason of such fraudulent representations the said policy is not void?

9. Whether the said policy was assigned by Mehbub Bi to the plaintiff?

10. Whether the said assignment, if made, was not without consideration and whether plaintiff can sue on the said policy?

11. Whether the said Mehbub Bi died on 2nd October, 1894?

12. Whether plaintiff is entitled to further relief than a decree for the amount paid in Court?

13. Whether, in the event of its being found that plaintiff is entitled to be paid the amount of the policy, the defendants are not entitled to deduct Rs. 402-8-0 from the amount so payable?

14. Whether plaintiff is entitled to any and what relief?

Inverarity and *Anderson*, for plaintiff :—The policy was originally for Mehbub Bi's benefit, but she assigned it to the plaintiff. That assignment was good and the plaintiff as assignee is entitled to sue. Consideration was paid, but none was necessary—Bunyon on Life Assurance, (3rd Ed.), p. 24. Section 135 of the Transfer of Property Act (IV of 1882) does not apply. The assignment was in Hyderabad, where that Act is not in force. Further, it was not the assignment of an actionable claim—*Shib Lal* v. *Azmat Ullah* [1]. Even if it was Bhandara who insured Mehbub Bi's life, the insurance is valid. In India it is not necessary to have an interest in the life of the assured. Statute 14, Geo. III, c. 48, which was the first statute in England relating to the subject, does not apply to India. It was not extended even to Ireland until 1866, and there it only applies to insurances

(1) (1896) 18 All., 265.

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effected after that date. See Bunyon on Life Assurance, (3rd Ed.), p. 5. There is no Act on the subject in India.

Lang (Advocate General), *Scott* and *Lowndes*, for defendants :—Bhandara had no interest in Mehbub Bi's life. He effected the insurance for his own benefit. Such a contract is a wager and is void—*Howard* v. *Refuge Friendly Society*(1). The assignment to Alamai was a fraud. See Bunyon on Life Assurance, (3rd Ed.), pp. 25, 26; *Wainewright* v. *Bland*(2); *Shilling* v. *Accidental Insurance Co.*(3). Assuming the assignment was really made, the assignee cannot sue for more than he paid—Section 135 of the Transfer of Property Act (IV of 1882). Counsel also referred to Stat. 8 and 9 Vict., c. 106; *Ramloll* v. *Soojunmull*(4); *Wheelton* v. *Hardisty*(5); *Warnock* v. *Davis*(6); *Connecticut Mutual Life Insurance Co.* v. *Schaefer*(7).

23*rd March*, 1898. FULTON, J.:—The plaintiff has instituted this suit to recover Rs. 25,000 due on a policy on the life of Mehbub Bi, who died on the 2nd October, 1894, after assigning her policy to the plaintiff.

The defendant company have filed two written statements denying liability and have raised the following issues:—(His Lordship stated the issues and continued).

The plaintiff is the wife of Mr. N. F. Bhandara, a barrister practising at Hyderabad in the Deccan. The insured Mehbub Bi was the wife of one Abdul Samad, who is in the service of Mr. Bhandara as munshi. The evidence shows that about May, 1894, Mr. Bhandara was much interested in insurances, and introduced several persons to Mr. Limji, the defendant company's sub-agent in Bombay, with whom he carried on an active correspondence. Among other insurances he arranged for a policy for Rs. 25,000 on the life of Mehbub Bi for a term of ten years. A proposal for Rs. 50,000 was submitted on the 16th May. After some delay it was accepted to the extent of Rs. 25,000 with effect from the 30th July. The first premium of Rs. 40-4-0 was paid

(1) (1886) 54 L. T., 644.
(2) (1835) 1 Moo. and R., 481.
(3) (1857) 2 H. and N., 42.
(4) (1848) 4 Moo. Ind. Ap., 339.
(5) (1857) 8 Ell. and B., 232.
(6) (1881) 104 U. S. Rep., 775.
(7) (1876) 94 U. S. Rep, 457.

through Mr. Bhandara and received by the company on the 3rd August. The second premium was also paid through him and received on the 29th August. On the 1st September, Mehbub Bi is said to have executed an assignment of her policy to the plaintiff, who gave her Rs. 80-8-0, being the amount of the two premia already paid. On the 3rd September she fell ill, and she died on the 2nd October.

Now, assuming that the law on the subject of insurances effected on lives in which the owner of the policy is not interested is the same in this country as in England, the determination of the first two issues is most important for the decision of this case. In most cases, which depend on a true appreciation of the motives and intentions of the parties, the difficulty of arriving at a correct solution is apparent. In the present case that difficulty is greatly enhanced by the fact that the evidence of many of the witnesses has been taken on commission and that the husband of the deceased has not been examined at all. In the first instance Mr. Justice Tyabji when issuing a commission for the examination of the plaintiff and certain other witnesses at Hyderabad whose attendance in Bombay could not be secured, refused, very properly in my opinion, an application to issue a commission for the examination of Abdul Samad. At the trial the application was renewed by Mr. Anderson, for the plaintiff, on the ground that Abdul Samad was unwilling to come here during the prevalence of the plague, but, having regard to the position in which he stands to the husband of the plaintiff, it seemed to me that the objection of the defendants' counsel to the issue of a commission for his examination was well founded. The defendants were able to produce in Court the father and mother of the deceased, and it appeared to me that the plaintiff ought to have had no real difficulty in bringing forward in the same way her husband's servant.

Before proceeding to decide the issues now under consideration it will be convenient to recapitulate the evidence so far as it relates to them. Mr. Bhandara states as follows:—

"I knew the deceased Mehbub Bi. She was the wife of Abdul Samad. Abdul Samad was and still is my munshi. He did all kinds of work for me regarding my household. He has been in my employ since 1887. I now give

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him Rs. 200 ever since his marriage with Mehbub Bi. The marriage was about November and December, 1893. At first his pay was Rs. 50. I increased his pay from time to time up to Rs. 200 at the time of his marriage."

The witness then goes on to describe how towards the end of April, 1894, he got into correspondence with the defendants' sub-agent Limji and negotiated issurances for a number of people. Then he proceeds as follows:—

"Mehbub Bi's husband told me she wanted to insure her life. He wanted to know the cheapest system I told him the cheapest system would be to go in for a ten years' short-term policy and renew it after ten years. I asked him how much he was ready to pay a month. He said Rs. 40 or 50.

"I told him Rs 25,000 would be insured for about Rs. 40. He said: 'All right. Propose for that.' I said: 'You had better propose for Rs. 50,000 and they will accept about half' After hearing that, he brought his wife the next morning. They both said in the presence of me and Mrs Bhandara, that Mehbub Bi wished to insure her life. My wife asked why her husband did not get insured. She said 'I insure for myself, because if I happen to have children, my husband will get married again and my children will remain unprovided for.' I told Mehbub Bi to get the policy drawn up in her husband's name; otherwise, if she died without leaving children, her parents would get a share as well as her husband. She approved. I got the forms filled up. Two premia were paid through me. Mahamed Abdul Samad gave me the money and I sent the premia. He asked me to send the money. Subsequently the policy was assigned to my wife. On the morning of 31st August, Mehbub Bi and her husband came to our place at Hyderabad. My wife and I were in our compound. Mehbub Bi went inside. Her husband spoke to me in presence of my wife saying that Mehbub Bi wanted her policy to be on the endowment system, that is, payable at 45 or 50 or at death, if previous, and that if somebody would buy it up and pay the premia which she had paid she would sell it to that person. I said an insurance on the endowment system would cost double the premium. He said. 'Well that does not matter. We will have the assurance for half the amount.' Then my wife offered to purchase it by paying the premia already paid by Mehbub Bi, and we all went inside to speak to her about it. My wife asked her whether she was going to sell her policy. She said yes, because her husband had told her that policies could also be issued on the endowment system and she preferred that system to the present one. She offered to sell her then existing policy to any one who chose to buy by paying the premia already paid, to her. My wife offered to purchase it and she agreed to the purchase. I told her also that she would have to pay double the premium, unless she chose to reduce the amount by half. She said she was agreeable to have the insurance for only half the amount. I said: 'I will purchase a stamp paper. Come to-morrow to receive the money and sign the deed.' The document was prepared the same day and executed the next day. I prepared it. The husband's signature was then

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taken as well as Mehbub Bi's, because the policy was not received and we did not know whether it would be in her name or her husband's in consequence of my previous experience with my mother's policy." (In cross-examination) "Mehbub Bi suggested that she should be insured. She said she was anxious to be insured. I have no reason to disbelieve it. She was married to Abdul Samad about November, 1893. She did not speak or read English. She could not read Urdu. She could not write. She was uneducated in reading and writing. But she was intelligent in conversation. She knew about insurance. I had never spoken to her on the subject till this proposal. Her husband told me he had been talking to her about insurance She had said that if she died having children he would marry again and her children would be unprovided for. Then he suggested that she should insure her life. She was then 19. There was no sign of her having children. I know the doctor said she was not pregnant when he examined her. I don't know if she had any money of her own. I know nothing about her circumstances except that her father was a non-commissioned officer and they were respectable people. She was to pay the premia with her husband's money."

The evidence of the plaintiff Alamai on the subject is as follows:—

"I knew Mehbub Bi. She was wife of Mr. Bhandara's clerk. She is now dead. Her life was insured for Rs. 25,000. This was two years ago. Dr. Kelly examined her medically She knew that she was insured. She told me that lives of females are also insured and she was going to have her life insured. I asked her why did her husband not insure his life. She said: 'If I have children it will be for their benefit also.' She said that she was going to insure her life for Rs. 25,000. I knew that she had made a proposal for Rs. 50,000, as Mr. Bhandara had told her that, if she went in for Rs. 50,000, the company would accept the proposal to the extent of Rs. 25,000. I am now the owner of the policy. The policy was assigned to me. Mehbub Bi and her husband came to me. I was in the garden. Mehbub Bi came inside the house and her husband remained outside. I and Bhandara were in the garden. Mehbub Bi's husband told me that Mehbub Bi has come to speak about the policy and said she was desirous of being insured for a policy payable at 45 or 50, or at death if previous, and to dispose or sell off the present policy; after that we came inside the house and questioned Mehbub Bi as to whether she wanted to sell her policy. She replied in the affirmative. I told her I am willing to purchase the policy, and she signified her consent to sell it to me. Mr. Bhandara had told her husband outside and also spoke to Mehbub Bi inside that the premium on the policy will be a great deal—the system which entitled the policy-holder to get the amount in his life-time at 45 or 50 years of age. Mr. Bhandara had mentioned that double premia will have to be paid. Mehbub Bi and her husband said that she would insure her life for half the sum, but on the new system. The assignment was in writing. The assignment took place the same day in the evening or the next day. I cannot remember exactly. Mr. Bhandara had asked me Rs. 5 for the expenses, &c., of

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the stamps. I gave him the amount. The same evening, or the next day, Mr. Bhandara had written the assignment-deed and told me that the deed was ready. Mr. Bhandara read out the deed to Mehbub Bi. Mehbub Bi's husband was also present at the time. Then I brought Rs. 80-8-0 premia for two months which had been paid by Mehbub Bi at the rate of Rs. 40-4 0 per month and paid the amount to Mehbub Bi. Mehbub Bi handed over the amount to her husband. Then Bhandara asked Mehbub Bi to put her signature on the deed. Thereupon Mehbub Bi made some mark on the paper. Mr. Bhandara also asked her husband to sign. He asked why he should sign. Mr. Bhandara said that Mehbub Bi had not till then received the policy, and it was not certain whether the policy will be made out in her name or in her husband's name. Then he signed. The deed was attested by Bhandara. No other policy was taken out by Mehbub Bi because she fell sick." (In cross-examination) "Mehbub Bi did not know to read or write, but she knew all about insurance. It was her own wish, not her husband's or my husband's, that her life should be insured. She did not say how she was going to provide for premia. Previous to this I had not bought any other person's policy. My husband did not suggest that I should buy this policy. It was entirely my own idea I thought it was a good investment. Mehbub Bi was younger than myself and she had always had very good health. My health is delicate. All the negotiations for insuring her life and for assigning the policy to me were carried on by Mehbub Bi herself, not by her husband."

Govindrajalu was the Commissioner appointed to take Mehbub Bi's affidavit of age. He stated that the affidavit was made at Mr. Bhandara's house by a woman whom he identified as Mehbub Bi. The affidavit is marked E and is attested by Mr. Bhandara and Abdul Samad.

Mahomed Abdulla Khan said :—

"Mehbub Bi asked me for a certificate for life insurance, requesting me to certify that she was keeping good health. I gave her a certificate under my signature." (In cross examination.) "The health certificate that I gave to Mehbub Bi was filled in by Mr Bhandara, but he was not present when I signed the certificate. I knew Mehbub Bi for a year before I gave the certificate. I know her parents also. I had also seen Mehbub Bi. Mr. Bhandara did not ask me to sign the certificate. Abdul Samad also did not ask me to sign the certificate. Mehbub Bi did not tell me how much she was going to be insured for. She did not mention the name of the company."

Syed Mahomed said :—

"I had been to Mr. Bhandara on some business. I wanted to enter the house. A man prevented me from entering, saying there was zanana inside. After some time the man informed Mr. Bhandara of my arrival. Thereupon Abdul Samad and Mr. Bhandara came out and asked me to get in. They asked me to take

my seat there. There I saw Abdul Samad's wife, his mother, Bhandara's wife and his mother, and Dr. Kelly. Mehbub Bi was standing near the wall and Dr. Kelly made a mark on the wall corresponding to the height of Mehbub Bi. Then he measured the height of the mark on the wall. I asked Abdul Samad what was going on. Abdul Samad told me that Mehbub Bi was going to have her life insured. I asked him what insurance meant. Abdul Samad told me that he would speak to me at leisure. Then I told him that as you are not at leisure I will see you again. Mehbub Bi had no pardah with me, as Abdul Samad is related to me."

Karim Bi, mother of Abdul Samad, said :—

"Six months after Mehbub Bi's marriage she was examined by a doctor. The doctor's name is Kelly. Dr. Kelly is dead. The examination was in connection with life insurance, as she had told me that she was going in for life insurance. I asked her what life insurance meant. She said that some money has to be paid every month and after her death the children of Mehbub Bi will get some money. Three or four months after she again told me that her proposal for insurance was accepted to the extent of Rs. 25,000. I told her, may you always be happy. I don't know who is the owner of the 'Biwa'. Two or three months after Mehbub Bi's death I asked my son about the insurance money. Abdul Samad said she made it over to Bai in her life-time. Mehbub Bi did not tell me that I would also get some share of the insurance money after her death. Mehbub Bi did not tell me for how much she wanted to be insured. I asked her particularly. Even then she did not tell me. I did not ask my son. Four or five months after Dr. Kelly's examination, Mehbub Bi told me that she had been accepted for Rs. 25,000. At this time I did not ask her for how much she was proposed. I dont know who negotiated all the transactions regarding the life insurance. Mehbub Bi never told me in her life-time that she had assigned her policy to Mrs. Bhandara. Mehbub Bi knew to read and write a little."

All these witnesses, excepting Mr. Bhandara, were examined on commission.

I now come to the next two witnesses whose statements it is necessary to refer to, namely, the father and mother of Mehbub Bi, who gave their evidence in Court. (In cross-examination.) Abdul Majid, the father, said :—

"My daughter informed me that her life was insured. She did not ask me to make an affidavit about her age. My daughter once came in the Mohorrum and then she told me all about this insurance. She said : 'My husband puts some money into Sirkár every month in my name, Rs. 15 per month. The amount was to be paid for ten years.' She told me that some amount was to be got even after her death. She did not mention the sum. She said the amount was to be paid every month, and she had been examined by the doctor. It may be

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that she told me that Rs. 40-4-0 were to be paid every month, but I do not remember. She mentioned the amount, but I forget it. Whatever the amount I understood that the husband paid the Sirkár during her life-time. That is what she mentioned to me I don't know whether I could get any of the insurance money as her father. That is a matter of law. I am an ignorant person My daughter never told me she wished to change her policy. She told me that something was to be paid and that something was to be received, but for whose benefit she did not say She had spoken to me before her illness about the insurance but not during the illness She talked much with my wife, but not with me"

Amina Bi, the mother of Mehbub Bi, said —

"I came to know in Mohorrum when she came to my house and said that she had been examined by a doctor and her life had been insured. She did not know how to read or write. Rs 15 were to be paid in respect of the insurance. She did not tell me anything about the amount to be recovered. She appeared to be pleased about it I was constantly with her when she was ill During her illness she said to me that Abdul Samad and his mother were talking about the insurance Bhandara and his wife and Abdul Samad and his mother were talking about it I asked my daughter what they were talking about. She said they were talking about the insurance on her life. Then I kept quiet. I did not know who was to get the insurance money Mehbub Bi told me that there would remain some money in deposit with Sirkár and after her death we should not be put to any trouble When she came to us I asked why she had got her life insured and she said it was for our good" (In cross examination) "I heard from Mehbub Bi that her husband would go on paying every month to the Sirkár. I understood that he would pay it out of his salary. I have now for the first time heard of the insurance being sold to Bhandara"

Now on this evidence it is clear that Mehbub Bi knew that her life was insured and had some idea that on her death her husband or family would get something. But I think it is equally apparent that she did not really understand the nature of the transaction. If her father and mother are to be believed, she thought her husband paid only Rs. 15 a month, whereas the premium was really Rs. 40-4-0. When pressed in cross-examination the father, it is true, admitted that possibly she might have mentioned Rs. 40-4-0, but it is evident that, unless he was intending to give false evidence, the real impression on his mind was that she said Rs. 15. However this may be, it seems clear that she never mentioned the assignment to her father, mother or mother-in-law during her illness. The only reference she is said to have made to the money to be received on her death was in

a remark to her mother reported as follows:—"Mehbub Bi told me that there would remain something in deposit with the Sirkár and after her death we should not be put to any trouble." This remark shows that she was thinking of death, which was only natural having regard to the serious nature of her illness. Surely, then, if she had understood that she and her husband had just made over to the plaintiff all their interest in the policy, she would have been full of regret at having done such a foolish act. It is quite evident, however, that she never expressed any regret at all.

The evidence of her father and mother, confirmed as it is by that of Abdul Samad's mother, proves that she never mentioned the assignment, and this silence on her part is hardly consistent with the supposition that she was aware of it. She is not said to have mentioned to her father, mother, or mother-in-law her alleged desire for a different kind of policy, and the story that she had such a desire rests entirely on the evidence of Mr. and Mrs. Bhandara. The account given by these two witnesses of the transaction is a strange one. It pictures Mehbub Bi well versed in questions of insurance, taking an intelligent interest in the subject, but leaves it difficult to conjecture why her interest ceased just when, if she had rightly understood the situation, she must have known that she and her husband had made a lamentable mistake.

The question which has now to be considered is whether when Mr. Bhandara first obtained the policy in her name he intended it to be for her or her husband's benefit, or whether throughout he intended to procure the benefit of it for himself or his wife. In the case of *Wainewright* v. *Bland*[a] Lord Abinger put a similar question of fact to the jury in the following terms:—"Who was the party really and truly effecting the insurance? Was it the policy of Miss Abercromby? Or was it substantially the policy of Wainewright, the plaintiff, he using her name for purposes of his own. If you think it was the policy of Miss Abercromby effected by her for her own benefit, her representative is entitled to put it in force, and it would be no answer to

(a) (1835) 1 Moo. and R., 481 at p. 487.

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say that she had no funds of her own to pay the premiums; Wainewright might lend her the money for that purpose and the policy still continue her own. But on the other hand, if looking to all the strange facts which have been proved before you, you come to the conclusion that the policy was in reality effected by Wainewright; that he merely used her name, himself finding the money, and meaning (by way of assignment or by bequest or in some other way) to have the benefit of it himself, then I am of opinion such a transaction would be a fraudulent evasion of the Statute of 14 Geo. III, c. 48, and that your verdict should be for the defendants." In appeal the case was decided in favour of the defendants on another issue, but the summing up was approved by the Court of appeal in *Shilling* v. *Accidental Insurance Co.*[1].

Assuming, then, that if it were found that this policy was effected on pretended behalf of Mehbub Bi, but really for the use and benefit and on account of the plaintiff or her husband, the contract would be void under section 30 of the Contract Act (IX of 1872), the question to be decided would be similar to the issue raised in the above-mentioned cases. For deciding such an issue I can only regret that I have not the assistance of a jury, but as it is I must be guided by the probabilities of the case and cannot give undue weight to the deeply interested evidence of Mr. and Mrs. Bhandara.

Now it seems to me, looking to the rapidity with which the assignment followed the insurance, that there is reasonable ground for suspecting it to be part of the same transaction. It is difficult to believe the story that Mehbub Bi wanted an endowment policy. Possibly she and her husband might thus quickly have changed their minds as to the sort of policy required, but if they had had any ordinary prudence (assuming that they really wished for a policy) they would have taken care to secure the new one before abandoning the old. Mr Bhandara must have known, after his experience of the impossibility of increasing the insurance on his mother's life, how difficult it would be to obtain a further policy on Mehbub Bi's; and, if he was acting fairly towards her and her husband,

(1) (1857) 2 H. and N., 42.

and there was no prearrangement between him and Abdul Samad, he would naturally have cautioned them against parting with one policy before getting the other. But he has not been accused of acting unfairly towards them. Abdul Samad, who appears to have been the great loser by the assignment, seems never to have uttered a complaint at the way in which his chances of succeeding to Rs. 25,000, or a large part thereof, have been frustrated. He merely told his mother that his wife had made over the policy to the Bai in her life-time. Surely this looks as if he knew that he and his wife had no real interest in it; as if he regarded the assignment as the last act in a transaction in which his wife's name was used, but in which he was not truly concerned; and as if, therefore, he had nothing to grumble about. According to Mr. and Mrs. Bhandara there had been no suggestion of an assignment till the 31st August, but the quick way in which everything was settled, suggests prearrangement between Mr. Bhandara and Abdul Samad.

Another consideration pointing in the same direction is the improbability of Bhandara's taking all the trouble of correspondence for effecting the insurance and remitting the premia unless he intended to have the benefit of the speculation. Mr. Anderson urged that he was an enthusiast about insurance and had helped many others to insure. Mr. Bhandara ascribed his zeal to a desire to befriend Mr. Limji, the Bombay sub-agent. While, however, making all due allowance for these motives it is difficult to attribute to pure benevolence his eagerness about Mehbub Bi's insurance. The correspondence shows that he believed in insurance as a speculation, and on the whole it seems more likely that he was speculating for himself or his wife than for Mehbub Bi or her husband. The mere fact that Mehbub Bi knew of the insurance and expected that her heirs would get something out of it, is not conclusive proof that the policy was obtained by Bhandara for her benefit; for according to Lord Abinger's summing up, the real question is not what she knew, but what he intended. If the law renders void an insurance on the life of a stranger, and if Mr. Bhandara effected this insurance, intending by assignment or otherwise to get the benefit of this policy, it would, in the language of Lord Abinger,

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be an evasion of the law which would disentitle him to recover and also his wife, who was clearly acting in concert with him when she took the assignment.

In every case the decision depends on special circumstances peculiar to it, and, therefore, the verdict in *Wainewright* v. *Bland* is no help on the facts. A decision to a contrary effect will be found referred to on page 24 of Bunyon on Life Assurance (3rd Ed.); *Vezina* v. *New York Life Co.*(1). In the latter case, in which a policy was assigned almost immediately, the transaction was upheld, but there apparently the Supreme Court was satisfied that, in the first instance, the contract had been made for the benefit of the insured.

In the present case in determining whether Bhandara when purporting to be negotiating an insurance for Mehbub Bi was really working to get the policy for himself or his wife, the arguments on either side seem to be as follows :—

For the reality of the policy :—

1. Bhandara negotiated insurances for many persons and was deeply interested in the subject.

2. Mehbub Bi's husband probably acquired a good deal of knowledge about insurance and communicated it to his wife.

3. She was anxious to provide for possible children.

4. She understood the effect of the insurance, as she told her father and mother about it and her mother-in-law that she was insured for Rs. 25,000.

5. The insurance was effected openly, and her father affixed his seal to a draft affidavit of her age.

6. The desire for an endowment policy was reasonable and explains the assignment.

7. There is no reason for disbelieving the plaintiff and his wife.

8. Abdul Samad is an intelligent man hardly likely to let his wife's name to be used in the manner suggested.

(1) 6 Canada S. C., 30.

9. Abdul Majid and his wife are untrustworthy witnesses whose accounts of the conversations with Mehbub Bi are unreliable.

Against the reality of the policy :—

1. Mehbub Bi was an illiterate Mahomedan woman and it is most unlikely that she understood anything about life insurance.

2. Her mother-in-law and her parents were ignorant of its nature. So was Syed Mahomed.

3. If she had understood anything about it, she, a healthy young woman of 19, would never have insured for ten years as if she expected to die in that period.

4. She did not understand what was due, as she could not tell her parents what the premium was. It is doubtful if she told Karim Bi the amount of insurance, for Karim Bi is not a very reliable witness, being the mother of Abdul Samad, who is under Bhandara's influence.

5. Abdul Majid denies having sealed the draft affidavit of age, or knowing anything of the insurance till his daughter's visit at the Mohorrum.

6. The kind of policy selected marks it as the insurance of a speculator gambling on Mehbub Bi's life.

The speculator can only have been Abdul Samad or Bhandara.

7. Bhandara's letters and his proceedings in reference to his mother's insurance show him to be a speculator in insurance.

8. The speculator cannot have been Abdul Samad, unless we attribute to him great vacillation in assigning thus quickly without attempting to get another policy in exchange.

9. If he knew much about insurance he must have known of the difficulty of insuring native female lives, and was not likely, if speculating on his own account, to have parted with the policy he had got before getting another.

10. There is nothing to show that Abdul Samad was a speculator, and it is most unlikely that he should have undertaken to pay Rs. 40-4-0 per mensem, a large sum to a person in his

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rank of life, on the mere chance of making a profit on the death of his wife, who was several years younger than himself.

11. After his wife's early death he is not shown to have expressed any disappointment at having allowed the money to slip through his fingers. He seems to have borne the loss with equanimity, though most people would have murmured a good deal.

12. The story of Mehbub Bi's desire for an endowment policy and the whole account of the assignment as an unpremeditated transaction is so improbable that it cannot be believed. Mr. Scott in argument characterised it as a ridiculous story

13. Mehbub Bi apparently knew nothing about the assignment, as she never mentioned it. She told her mother that some money would remain with the Sukái after her death, and that her parents would have no trouble. Her ignorance of the facts shows that she was a mere tool in the hands of others

14. There is no reason for disbelieving Abdul Majid and his wife, who gave their evidence fairly and did not attempt to conceal Mehbub Bi's knowledge of the insurance. They were confirmed by Karim Bi as to her silence about the assignment.

15. Bhandara doubtless knew that he could not insure direct on a stranger's life, and, therefore, took out the policy in her name. He was apparently contemplating taking or recommending other insurances on female lives, as he was asking for forms.

16. The evidence of Mr. and Mrs. Bhandara is unreliable He is in money difficulties and the interest at stake is large.

Such, I think, are the arguments on either side, and looking at all the circumstances together I am forced to the conclusion that the insurance was effected by Bhandara not for the benefit of Mehbub Bi or her husband, but with the intention of securing by assignment the benefit for himself or his wife. His wife comes forward with a policy assigned to her by an illiterate Mahomedan woman within a few weeks of the acceptance of the risk. The policy was wholly negotiated by him and the premia were remitted by him. It is difficult to conceive a state of circumstances more clearly throwing on him the burden of proving affirmatively that when he negotiated the policy he

was acting for the benefit of the woman or her husband and not for his own benefit or that of his wife. The interested evidence of himself and his wife seems insufficient to discharge that burden, weakened as that evidence is by the fact that Abdul Samad is not known to have expressed any regret at the loss of the money, and that Mehbub Bi apparently did not know of the assignment.

I, therefore, find on issues 1 and 2 for the defendants.

In discussing this subject I have carefully avoided reference to Mehbub Bi's early death, for as there is no allegation or proof of foul play, that death is wholly irrelevant in endeavouring to ascertain Bhandara's intentions just as it obviously would have been if she had been killed by a railway accident.

The next question to consider is whether in India an insurance for a term of years on the life of a person in whom the insurer has no interest, is void under section 30 of the Contract Act (IX of 1872). Irrespective of authority it seems difficult to say in what respect an agreement by A to pay an annuity on condition that the annuity is to terminate and a large sum is to be received in case of the death of B within a prescribed period differs in principle from an agreement to pay a small sum if a horse loses a race on the condition that a large sum is to be paid by the other party if he wins, or, to make the analogy more close, if he passes the winning post within a certain time. The latter transaction would undoubtedly be treated as a wager and be avoided by the section. It is difficult, then, to see why the former does not fall within the same category as being a wager in which odds are given against the chances of a person dying within a certain number of years. But it may be said that though the analogy between life insurance and a bet looks stronger in case of short-term policies on the lives of strangers, the argument really applies with equal force to all life insurances[1]. Consequently, it may be urged that as life insurance is within certain limits recognised as a valid transaction by the Courts in England notwithstanding the law against gaming and wagering, no form of life insurance falls within the term an "agreement by way

(1) Bunyon on Life Assurance (3rd Ed.), p. 6.

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of wager" used in section 30 of the Contract Act. I do not think that this argument, however, is sound. We cannot interpret the words of an Indian Act quite irrespective of English decisions and the phraseology of English Acts. The distinction between insurances that are legitimate and insurances that are by way of gaming and wagering is clearly recognised in numerous decisions. The Act of 14 Geo. III., c. 48, forbids insurances "on the life or lives of any person or persons or on any other event or events whatsoever wherein the person or persons for whose use, benefit or on whose account such policy or policies shall be made shall have no interest or by way of wagering or gaming." Since that Act a certain class of policies, which would include the policy sued on in this case if my decision on issues 1 and 2 be correct, have always been described in judicial decisions as wagering policies. In *Howard* v. *Refuge Friendly Society*[1] certain policies on lives in which the person to be benefited had no interest, were described in one place as "wagering policies" and in another as "wagers", and were said to come within the prohibition not only of Stat. 14 Geo. III, c. 40, but also of the more recent Act of 8 and 9 Vict., c. 109, Sec. 18. In argument it was contended that this reference of Mr. Justice Matthew to the latter Act was unnecessary, and that his decision really rested on the Act of Geo. III, but it seems to me to show that in his opinion certain policies had in legal phraseology acquired the title of wagering policies and that, therefore, they were equally rendered void by section 8 of 8 and 9 Vict., c. 109, which dealt with all agreements "by way of gaming or wagering" as well as by the earlier Act of Geo. III, which only related to a particular class of agreements, *viz*, "policies by way of gaming or wagering".

In *Shilling* v. *Accidental Insurance Company*[2], in the plea which held good, the policy was described as a "gaming or wagering policy" contrary to the statute. In *Dalby* v. *India and London Life Assurance Company*[3] it is said that if there is an interest at the time of the policy it is not a "wagering policy". In the American case of *Connecticut Mutual Life Insurance Com-*

(1) (1886) 54 L. T., 646. (2) (1857) 2 H. and N., 42.
(3) (1854) 15 C. B, 365.

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pany v. *Schaefer*[1] an interesting history of the subject will be found. In that judgment, policies on lives in which the person effecting the insurance has no interest are called wager policies. What constitutes a wager policy is discussed, and it is said that to make a policy valid, the essential thing is that the policy shall be obtained in good faith and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. The same expression "wager policy" is used in *Warnock* v. *Davis*[2], while in *Scott* v. *Roose*[3] a similar policy is spoken of as a "gambling policy".

It simply comes to this: what is the meaning of the phrase "agreements by way of wager" in section 30 of the Contract Act which I prefer to consider rather than section 1 of Bombay Act III of 1865, the applicability of which to this case might possibly be questioned. Can it be that the words mean something different in India from what the corresponding words "agreements by way of wagering" mean in England? I do not see how such an argument can be maintained, or how the fact that 14 Geo. III, c. 48, is not in force in India affects the question. In *Hampden* v. *Walsh*, Cockburn, C. J., defined a wager as a contract by A to pay money to B on the happening of a given event in consideration of B paying money to him on the event not happening, and said that since the passing of 8 and 9 Vict., c. 109, there is no longer as regards actions any distinction between one class of wagers and another, all wagers being made null and void at law by that statute. In *Thacker* v. *Hardy*[4], Cotton, L J., said that the essence of gaming and wagering was that one party was to win and the other was to lose upon a future event, which at the time of the contract was of an uncertain nature; but he also pointed out that there were some transactions in which the parties might lose and gain according to the happening of a future event which did not fall within the phrase. Such transactions, of course, are common enough, including the majority of forward purchases and sales.

A certain class of agreements such as bets, by common consent, come within the expression "agreements by way of wager."

(1) (1876) 94 U. S. Rep., at p. 460
(2) (1881) 104 U. S. R., 775.
(3) (1841) Long and Town. Ir. Rep., 54.
(4) (1878) 4 Q. B. D., 685 at p. 695.

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Others, such as legitimate forms of life insurance, do not, though looked at from one point of view they appear to come within the definition of wagers. The distinction is doubtless rather subtle and probably lies more in the intention of the parties than in the form of the contract. In such doubtful cases it seems to me that the only safe course for the Courts in India is to follow the English decisions, and that where a certain class of agreement has indisputably been treated as a wagering agreement in England it ought to receive the same treatment in India[1]. The framers of the Indian Codes were English lawyers, and where they have used words or phrases which have received a technical signification it must, I think, be presumed that they have used them in the technical sense. An insurance for a limited term of years on the life of a stranger certainly comes within the definition of a wager given by Cockburn, C. J., and it would, therefore, I think, be necessary for any one contending that it did not come within the intention of section 30 of the Contract Act to point to some technical consideration in support of such a contention. It seems impossible, however, to suggest any such considerations, inasmuch as the term "wager" has frequently, as above pointed out, been applied to policies of this class which have usually been treated as wagers of a most objectionable kind (see remarks of Lush, J., in *Evans* v. *Bignold*[2] and of Richard, B., in the case of *Scott* v. *Roose*[3]).

On the third issue I find that Mr. Bhandara had no interest in the life of Mehbub Bi, and on the fourth that the policy is void under section 30 of the Contract Act.

On the other issues of fact I will only briefly record my findings.

Issue 5.—I do not think it proved that the policy was obtained by fraudulent misrepresentations as to the means and circumstances of Mehbub Bi. The misrepresentations are said to be contained in letters Exhibits 22, 26 and 28. It is impossible to point to any material statement which is certainly false. It may be improbable that Abdul Samad's salary was Rs. 200 per month,

(1) See *Trimble* v. *Hill* (1879) (5 Ap. Ca., 342) and *Kathama Natchiar* v. *Dorasinga* (1875) (2 Ind. Ap., 169 at p. 186).

(2) (1869) L. R., 4 Q. B., 623.

(3) (1841) Long and Town. Ir. Rep., 54.

but it is impossible to say that it was not. Mehbub Bi's father does not think it was so much, and one would not expect a man in Abdul Samad's position to get so much, but we do not know enough about him, or the duties which he performed, to make it safe to pronounce definitely on the subject. It is impossible to be sure that he did not keep a horse, and the allegation, that he got some landed property from his father, seems true. He got one house from his father and now appears to have others and it is clear that a considerable sum was spent on his marriage.

As the allegations are not shown to be untrue it is unnecessary to consider what their effect on the policy would have been if false.

Issue 3—I do not think the assignment by Mehbub Bi is proved. I dare say she did make her mark, but that is not enough. She could not read or write, and it is for the plaintiff, who puts forward the paper, to show not only that she made her mark, but also that she understood the nature of her act, or, in other words, that she made what is called by the Privy Council in *Ramrutton* v *Musst Nandu* an intelligent signature. The story that she said she wanted an endowment policy seems hardly credible, and her subsequent silence about the assignment indicates pretty clearly that she did not know she had assigned. Her application of 16th May was for a policy in favour of her husband Abdul Samad. On the 3rd September the policy had not been received and it was not known whether it would come in her name or her husband's. In these circumstances the signatures of both were taken, but apparently Mehbub Bi did not really understand what was being done. I think this issue really goes with issues 1 and 2. If there was an understanding throughout between Bhandara and Abdul Samad, that Mehbub Bi's name only was to be used and an assignment taken as soon as possible, probably no great effort would be made to explain to her what she was executing, and her subsequent silence on the subject would be intelligible, as also Abdul Samad's indifference about the loss of the money. If, on the other hand, the policy was really intended to be for her use, there would, of course, be less reason to doubt the reality of the assignment.

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On the 11th issue I find that Mehbub Bi died on 2nd October, 1894. The fact was not disputed.

On the various points of law arising on the other issues it is unnecessary to express an opinion.

On the interesting question much discussed in argument whether an assignment of a life policy to a stranger having no interest in the life of the insured is void, I am not prepared to give a decision. But I may point out that, if the contract of insurance is good in its inception, the assignment to a stranger cannot render it void as a wager under section 30 of the Contract Act. There is no fresh contract between the assignee and the company, and there is no wager between the assignee and the assignor who sells his policy outright. It may be, however, that such an assignment is void as contrary to public policy, but if so the question would usually only arise as in the American cases of *Warnock* v. *Davis*[1] and *Cammack* v. *Lewis*[2] between the assignee and the representatives of the insured. As against the company the policy would remain valid, whether for the benefit of the assignee or the representatives, and the contest would ordinarily be between them alone. In the present case doubtless if the assignment were pronounced void, the present plaintiff could not recover; but while the American cases would receive full and respectful consideration if the decision turned on this issue, the English authorities on the question of "public policy" would have to be carefully studied.

As the findings on issues 1 to 4 are sufficient for the determination of this case, it is unnecessary for me to pursue this subject further.

I dismiss the claim with costs.

Suit dismissed.

The plaintiff appealed. The appeal came on for hearing before Farran, C. J., and Tyabji, J., on 12th August, 1898.

Macpherson and *Anderson*, for appellant (plaintiff).

Branson and *Scott* for respondents (defendants).

(1) (1881) 104 U. S. Rep, 775. (2) (1872) 15 Wallace, 643.

In addition to the authorities cited in the lower Court, the following cases were referred to:—*Macgregor* v. *Fergusson*[1], Arnold, Vol. I, p. 123; *Ashley* v. *Ashley*[2]; *Ætna Life Insurance Co.* v. *France*[3]; *New York Mutual Life Assurance Co.* v. *Armstrong*[4].

The Appeal Court confirmed the decree of the lower Court with costs.

Appeal dismissed.

Attorneys for the plaintiff (appellant):—Messrs. *Bicknell, Merwanji and Motilal.*

Attorneys for the defendants (respondents):—Messrs. *Crawford and Co.*

(1) (1850) Taylor and Bell, 378.
(2) (1829) 3 Sim, 149.
(3) (1876) 94 U. S Rep, 561.
(4) (1887) 117 U. S. Rep, 591.

ORIGINAL CRIMINAL.

Before Mr Justice Candy.

EMPRESS *v.* DURANT.

1898.
October 6.

Practice—Procedure—Witness—Accused person calling as witnesses persons charged with him and awaiting a separate trial for same offence—Criminal Procedure Code (Act V of 1898), Sec. 342, Cl. 4—Evidence Act (I of 1872), Sec. 132.

The accused D, a European British subject, was charged together with others who were natives of India, under sections 384, 385 and 389 of the Penal Code (Act XLV of 1860), with conspiring to commit extortion. D claimed to be tried by a mixed jury under section 450 of the Criminal Procedure Code (Act V of 1898) The other accused, who were natives of India, then claimed to be tried separately under section 452. The trial of D then proceeded, and at the close of the case for the prosecution, he proposed to call as his witnesses the persons who had been charged with him and who were awaiting their trial. They objected to be called.

Held, that he was entitled to call them as witnesses and to examine them on oath.

The words "the accused" in clause 4 of section 342 of the Criminal Procedure Code (Act V of 1898) mean the accused then under trial and under examination by the Court.

THE accused, who was a European British subject, was charged with four other persons (three of whom were natives of India)

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under sections 384, 385 and 389 of the Indian Penal Code (Act XLV of 1860) with conspiring to commit extortion.

They all claimed to be tried.

Durant being admittedly a European British subject claimed under section 450 of the Criminal Procedure Code (Act V of 1898) to be tried by a mixed jury, of which not less than half should be Europeans or Americans, or both Europeans and Americans.

The three accused who were natives of India, then claimed under section 452, clause 2, of the Code to be tried separately.

The trial of Durant then proceeded. He defended himself.

At the close of the case for the prosecution, Durant opened his case and addressed the jury. He then called as his witnesses the three persons who had been charged with him and who were awaiting their trial, *viz.*, Dhanjibhai D. Dady, Cursetji M. Mehta, and Sorabji R. Bottlewalla. Their counsel, however, who were present watching the case, objected to their being called as witnesses

P. M Mehta, for the accused Dhanjibhai D. Dady, submitted that an oath could not be administered to his client, who was a co accused with Durant and was awaiting his trial on the same charges.

He cited *Reg.* v. *Hanmanta*[1], *Empress of India* v. *Asghar Ali*[2]; *Queen-Empress* v. *Dala*[3]. The law in India is different from English law—*Wilson's case*[4].

Anderson and *Bahadurji*, for Cursetji M. Mehta and Sorabji R. Bottlewalla, also objected.

Durant contended he was entitled to call the co-accused. The cases cited were cases in which accused persons who are illegally pardoned were called as witnesses for the prosecution.

Macpherson, for the prosecution:—Under English law the co-accused could certainly be called as witnesses—Archbold's Criminal Pleading (20th Ed.), p. 318. The word "accused" in

* One of the accused, who was a European, was tendered a pardon under section 337 of the Criminal Procedure Code (Act V of 1898).

(1) (1877) 1 Bom., 610.
(2) (1879) 2 All., 260.
(3) (1885) 10 Bom., 190.
(4) (1865) 4 F. and F., 363.

the Criminal Procedure Code must mean the accused actually under trial. He referred to section 132 of the Evidence Act (I of 1872).

CANDY, J. :—As to the English law on this subject there can be no doubt. Besides the passage from Archbold referred to by the learned counsel for the prosecution reference may also be made to Roscoe's Criminal Evidence (11th Ed.), p. 122, where it is clearly shown that so long as the co-accused is not being tried jointly, he can be called as a witness. Mr. Mehta referred to the report of *Winsor's case*[1], but the question dealt with in that report was whether the jury were rightly discharged when the prisoners were tried together before Baron Channell in March, 1865. At the next assizes before Keating, J., in July, 1865, the two prisoners were again put on their trial, and then counsel for prosecution applied for leave to call the younger prisoner (Harris) as a witness against Winsor. Mr. Prideaux said that on the part of Harris he could make no objection to such a course of proceeding, but he would submit whether it would not be necessary that she should be first acquitted. The learned Judge said he had considered the point, and he thought that it was not necessary. Harris was then taken from the bar and Winsor was put upon her trial alone. Mr. Folkard, for Winsor, made no objection on that ground, but submitted that Winsor could not be put on her trial again, the jury in the former case not having been legally discharged. But Keating, J., held (p. 382) that the objection was not tenable: the trial proceeded and Winsor was convicted.

In January, 1866, the case came before the Queen's Bench[2] on a writ of error, and Mr. Folkard, for Winsor, argued (*inter alia*) that the evidence of Harris was improperly admitted.

The Judges all gave judgment for the Crown. There is one important passage in the judgment of Cockburn, C. J., which has been quoted in subsequent cases. He said (pp. 311-2) —

"In all cases where persons are joined in the same indictment, and it is desirable to try them separately in order that the evidence of one may be received against the other, I think it necessary, for the purpose of securing the greatest possible amount of truthfulness in the person coming to give evidence, to take a

(1) (1865) 4 F. and F., 363.

(2) (1866) L. R., 1 Q. B., 289.

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verdict of not guilty as to him, or, if the plea of not guilty be withdrawn by him and a plea of guilty taken, to pass sentence, so that the witness may give his evidence with a mind free of all corrupt influence which the fear of impending punishment, and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce."

But in the course of argument in the subsequent case of *The Queen* v. *Payne*[1], Cockburn, C. J., alluded to this passage and said (p. 351): "A notion has gone abroad that I laid down that one of these courses must be taken. That is very different from what I did say. I only spoke of what is convenient."

Payne's case is particularly instructive, because in that case Curtis had actually been called before the Magistrates as a witness on behalf of Payne. Subsequently Curtis was included in the indictment and was tried with Payne. Payne's counsel wanted to call Curtis as a witness, and naturally complained that it was very hard that his client should be deprived of Curtis's evidence by Curtis being made an accused person. To this Cockburn, C. J., said: "The remedy for that is to apply to have the prisoners tried separately. And, if the witness were improperly included in the indictment, the Judge would, no doubt, grant such an application."

It may be remarked that under section 239 of the Criminal Procedure Code (Act V of 1898) it is left to the discretion of the Court to try accused persons together or separately. In *Payne's case* it was held that Curtis could not be examined as a witness on behalf of Payne, because it is a principle of English law that the jury, which has to decide on the guilt or innocence of an accused person, cannot hear that person examined and cross-examined.

Another case in which one accused person was called as a witness on behalf of his co-accused, is the well-known case of *Reg.* v. *Bradlaugh*[2]. Bradlaugh with Ramsay and Foote was indicted for publishing blasphemous libels. Before the jury were sworn, Bradlaugh applied that he might be tried separately and first, arguing (*inter alia*) that he might desire to call his co-accused as his witnesses. Sir H. Giffard, for the Crown, opposed, but Coleridge, C.J., granted the application. When Bradlaugh was called on to enter on his defence, and it was suggested that

(1) (1872) L. R., 1 C. C. R., 349. (2) (1883) 15 Cox, 217.

he might call the other defendants as his witnesses, Avory on behalf of Ramsay objected that this could not be done, unless a verdict of acquittal was taken as against Ramsay. He cited the observation of Cockburn, C. J., in *Winsor's case* (*supra*). Coleridge, C. J., said that there the fellow-prisoner had been called for the Crown. Avory urged that this did not matter, as if the co-defendant were called for the defence he would be liable to cross-examination and could hardly avoid criminating himself. Coleridge, C. J., said he "should endeavour to avoid that by not allowing questions to be asked or answered which might have that effect." As to the dictum cited, he observed "that Cockburn, C. J., did not go the length of saying that the course taken was not legal, even when the fellow-prisoner had been called for the prosecution, to make out a case against the prisoner being tried. Here, however, the co-defendant was to be called for the defendant under trial. He could not prevent this, nor compel the prosecution to take a verdict of acquittal as to the co-defendant to be called. The co-defendant was to be called simply to disprove publication by the defendant Bradlaugh, and any questions to show publication by anybody else would either not be admissible, or, if they tended to criminate the witness, he would not be compellable to answer." I shall have occasion, at a later stage of these remarks, to refer to the difficulties felt by Coleridge, C. J.

Turning to the Indian cases quoted by Mr. Mehta, it may be remarked that *Asghar Ali's case*[1] and the case of *Dala Jiva*[2] are on all fours with *Hanmanta's case*[3], which they followed. It will suffice, therefore, to critically examine *Hanmanta's case*[3]. In that case two men, Moro and Ramchandra, were before the Magistrate as accused persons. They under the influence of illegally tendered pardon gave evidence as witnesses. M. Melvill and Kemball, JJ., relied on sections 344 and 345 of Act X of 1872 (the then Code of Criminal Procedure), and their Lordships said:

"The effect of these sections is to render it illegal for a Magistrate to convert an accused person into a witness, except when a pardon has been lawfully granted under section 347. Moro and Ramchandra being accused persons, and

(1) (1879) 2 All., 260.

(2) (1885) 10 Bom., 190.

(3) (1877) 1 Bom., 610.

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not having been legally pardoned, could not be examined as witnesses until they had been acquitted, or discharged, or convicted. Their evidence must, therefore, be rejected as absolutely inadmissible."

Their Lordships then referred to and distinguished the English case of *R.* v. *Rudd* [1], which was also the case of an illegally pardoned accomplice.

Now an obvious consideration which must occur to one on reading this decision in *Hanmanta's case* is that it refers solely to the evidence of an illegally pardoned accomplice, and is based on the combined effect of sections 341 and 345 of the then Code of Criminal Procedure. The provision in section 345 stood by itself as a separate section, and was not, as it now is in the present Code of Criminal Procedure, part of section 342, which deals with the examination of an accused person at the trial of that accused person, and provides that for the purpose of that examination in that trial no oath shall be administered to that accused person. Their Lordships in *Hanmanta's case* did not profess to deal with the case of an accused person, who has been indicted jointly, but is to be tried separately by a different jury or by different assessors, being called as a witness for his co-accused.

There was a case from Burma, ultimately decided by the High Court of Calcutta, in which the decision in *Hanmanta's case* was apparently not followed. It is to be found in Selected Judgments of the Judicial Commissioner, Burma, Vol. I, p. 246, and reference to it will be found at page 667 of the I. L. R., 16 Bom. In that case from Burma an illegally pardoned accomplice had given evidence. The Judicial Commissioner (J. Jardine) said: "The Courts have been strict in excluding evidence on illegal pardons * * *—*Hanmanta's case, Asghar Ali's case.* I hold, therefore, following *Hanmanta's case,* that as he (the witness in question) was not legally pardoned, he could not have been examined as a witness." As the Recorder differed from this view, the case was referred to the Calcutta High Court, which held (Mitter and Field, JJ.) that the evidence was admissible, though of course it would have to be carefully weighed. They said: "Under the Evidence Act, admissibility is the rule and exclusion the exception, and circumstances, which under

(1) (1775) 1 Cowp., 331.

other systems might operate to exclude, are under the Act to be taken into consideration only in judging of the value to be allowed to evidence when admitted."

That the decision in *Hanmanta's case* required a restricted application was evidently felt by Jardine, J., in *Queen-Empress* v. *Mona Puna*[1]. He distinguished the Burma case on the ground that the accused person in that case had not been actually placed before the Magistrate, though the Magistrate had at the request of the Police Superintendent illegally forwarded a pardon, under the influence of which the said person gave evidence as a witness. So Jardine, J., while admitting that the word "accused" is used in several sections of the Criminal Procedure Code as designating supposed offenders, went on to say: "But if we are to follow *Hanmanta's case*, the question arises, what is the meaning of the last sentence of section 342, "No oath shall be administered to the accused"? The decision can best be explained by holding that by "the accused" is meant a person over whom the Magistrate or other Court is exercising jurisdiction; and on the whole we think this restricted meaning best suits the context."

I would go further and say that "the accused" in section 342 must mean the accused then under trial and under examination by the Court. It cannot include an accused over whom the Court is exercising jurisdiction in another trial. I may be trying a murder case in this High Court, and an important witness, either for the Crown or for the defence, may be an accused person who has pleaded to a charge of house-breaking, and whose trial is to come on directly after the murder case. It would be absurd to say that no oath shall be administered to that accused person when he is tendered as a witness in the murder case. As the Judge said in *Asghar Ali's case* (*supra*), an accused person cannot be put on his oath or examined as a witness in the case *in which he is accused*. Dady, Mehta and Bottlewala are not accused persons in the case in which Durant is accused. Their case is to be tried separately. They were co-accused: they are not so now. If they were being tried jointly with Durant, it would be impossible to say that their statements recorded under section 342 of the Code of Criminal Procedure, whether amount-

(1) (1892) 16 Bom., 661.

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ing to confessions or not, could not be taken into consideration by the jury in favour of Durant. Why, then, should Durant be deprived of the benefit of these statements, because these men are not being tried jointly with him? But as they are not now being tried in this case, the only way in which they can make statements is as witnesses, and if they are witnesses, then they must be sworn.

For all these reasons I have no doubt that these persons, whom Durant has tendered as his witnesses, can be examined as witnesses, and, therefore, on oath. The only difficulty in my mind arises from the provisions of section 132 of the Evidence Act. As shown above in *Bradlaugh's case*, Coleridge, C J, said that he would not allow questions to be asked or answered which might have the effect of incriminating the witness. That course is not open to this Court, for by section 132 of the Evidence Act a witness is not excused from answering any question as to any matter relevant to the matter in issue in any civil or criminal proceeding upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate such witness. When an accused person is making a statement under section 342 of the Code of Criminal Procedure, he can refuse to answer any question. As a witness he is not excused from answering any question as to any matter relevant to the matter in issue. There is, however, an important proviso to section 132 of the Evidence Act, *viz.*, that no such answer which a witness shall be compelled to give shall be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer. As then the jury now trying Durant, and hearing his witnesses examined and cross-examined, will not be the jury which will have to decide as to the guilt or innocence of such of those witnesses as may be subsequently put on their trial, and as the answers which those witnesses may be now compelled to give cannot be proved against them in the subsequent trial, I rule that the witnesses now called by Durant on his behalf can be duly examined and cross-examined on oath.

Attorneys for the prosecution:—Messrs. *Craigie, Lynch and Owen.*

Accused in person.

APPELLATE CRIMINAL.

Before Mr. Justice Parsons and Mr. Justice Ranade

QUEEN EMPRESS *v.* RAGHU *

1898
March 14

Criminal Procedure Code (Act X of 1882), Sec. 533—Confession—Confession not signed by the accused—Admissibility of such confession—Parol evidence admissible to prove the terms of the confession

Section 533 of the Code of Criminal Procedure (Act X of 1882) is intended to apply to all cases in which the directions of the law have not been fully complied with. It applies to omissions to comply with the law as well as to infractions of the law

Queen-Empress v *Visram Balaji*(1) followed

Jai Narayan Rai v. *Queen-Empress*(2) dissented from

The accused was charged with murder At the trial a confession made by him before the committing Magistrate was tendered in evidence against him. The Sessions Judge rejected the confession as 'inadmissible, as it did not bear the mark or signature of the accused, and, as there was no other available evidence to bring home the charge to the accused, he was acquitted

Held, reversing the order of acquittal, that though the record of the confession was inadmissible, parol evidence could be given of the terms of the confession, and those terms, when proved, might be admitted and used as evidence against the accused under section 533 of the Code of Criminal Procedure (Act X of 1882). The accused was, therefore, ordered to be retried

APPEAL by the Local Government from an order of acquittal passed by C. H. Jopp, Sessions Judge of Ahmednagar.

The accused was charged with the murder of his wife and child.

He was alleged to have made a confession before the committing Magistrate.

The confession was taken down in the Maráthi language, in the form of question and answer, by a clerk in the presence of the Magistrate who made a memorandum in English.

The confession did not bear the mark or signature of the accused.

At the trial in the Court of Session the confession was retracted by the accused. Thereupon the prosecution examined the

* Criminal Appeal, No. 24 of 1898.

(1) (1893) 21 Bom., 495. (2) (1890) 17 Cal., 862.

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clerk who had written the confession. He stated that he wrote down what the accused said, that the statement was read over to the accused, and admitted by him to be correct, and that he told a kulkarni to get the accused to make his mark, but he did not do it.

The Sessions Judge held that the confession was inadmissible in evidence, and there being no other evidence sufficient to connect the accused with the offence, the Sessions Judge, concurring with the assessors, acquitted the accused. The following extract from the judgment gives the reasons for the acquittal:—

"The error of the Magistrate in omitting to ask the accused to sign the statement was, having regard to the probable intention of the Legislature, of such a nature as may have seriously prejudiced the accused in his defence on the merits. It may have deprived the accused of the opportunity given him by the law of denying the accuracy of the confession, and the statement is inadmissible in evidence under section 91 of the Evidence Act and under section 533 of the Code of Criminal Procedure, which so far from affording a remedy for a defect of this kind expressly excludes from the operation of this section errors which have injured the accused as to his defence on the merits. It may be noted that as the kulkarni, who was told to take the accused's signature, has not been examined, it cannot be pronounced for certain that the accused did not at the last moment refuse to make his mark and deny that the statement was correct.

"As the confession cannot be considered against the accused, and as the evidence in the case is insufficient by itself to establish the accused's guilt, it is plain that it is not proved that the accused caused the death of Anbi or of his infant daughter.

"The Court, agreeing with the assessors, directs that the said Raghu Mahadu be acquitted and discharged."

Against this order of acquittal the Local Government appealed to the High Court.

Rão Bahádur *Vasudev J. Kirtikar*, Government Pleader, for the Crown:—The Sessions Judge was wrong in holding that the confession of the accused was inadmissible in evidence merely because it was not signed by the accused. *Reg.* v. *Bai Ratan*[1] is not applicable to the present case. That ruling is, no doubt, followed in *Reg.* v. *Shivya*[2], *Reg.* v. *Apa*[3] and *Emp.* v. *Sivaji*[4]. But all these cases were decided under the old Code of Criminal

(1) (1873) 10 Bom. H. C. Rep., 163.
(2) (1876) 1 Bom., 219.
(3) (1873) 10 Bom. H. C. Rep., 181, foot note.
(4) (1877) 4 Bom., 15.

Procedure (Act X of 1872). But the law is now altered by section 533 of the present Code. Such an omission can now be cured by taking evidence that the accused duly made the statement recorded, and when the statement is so proved, it is admissible notwithstanding the provisions of section 91 of the Evidence Act. In accordance with this section the statement of the accused has been proved in this case by the clerk who wrote down what he said. The clerk deposes that the whole statement was read over to the accused, who admitted it to be correct. The Sessions Judge holds that the omission to ask the accused to sign the confession may have prejudiced him in his defence. But of this there is no proof. The statement is, therefore, admissible in evidence, and should be taken into consideration against the accused.

M. B. Chanbal, for accused :—No doubt the Full Bench ruling in *Bai Ratan's* case[1] and the cases in which it is followed are all decisions under the Code of 1872, but the principle laid down in those cases still holds good under the present Code. The reason why the accused is required to sign a confession, is that the law gives him a *locus penitentiæ*, a final opportunity, before the completion of the record, of showing that the confession was not voluntary, or made under improper influences, or that it is not accurately recorded. The accused is deprived of this opportunity when he is not asked to sign the incriminating statement. If it is not signed, the record is incomplete. Section 533 of Act X of 1882 was not intended to cure such a defect. When a confession is complete, the law requires the Magistrate to make certain endorsements at the foot of the confession. If any of these endorsements are omitted, section 533 would allow evidence to be taken to show that the provisions of the law were substantially complied with; but it cannot apply where the statement is not complete on the part of the person making it. The conviction would be based, not on what the accused himself had actually stated, but upon evidence of what he intended to state. Such a confession is no confession and cannot be used against the accused. Even if evidence be taken under section 533, it must show that the confession was *duly* made by the accused. The word "duly"

(1) (1873) 10 Bom. H. C. Rep. 146.

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means in accordance with the provisions of the law in that respect, and where the accused is not asked to sign what he has stated, or being asked, has refused to do so, no evidence can prove that the confession was duly made.

PARSONS, J :—This is an appeal by the Local Government against the order passed by the Sessions Court of Ahmednagar, acquitting Raghu Mahadu of the offence of murder with which he was charged. The chief ground of the appeal is that the Sessions Judge improperly rejected, as inadmissible in evidence, the confession made by the accused to the committing Magistrate.

It is somewhat difficult to ascertain what were the precise reasons which led the Sessions Judge to hold that the confession was inadmissible, and could not be treated as evidence, as he did after he had examined the kárkún who took it down in writing, and after he had allowed it to be read and recorded in the case. It is true that the Magistrate had not fully complied with the requirements of the law in recording the confession, for he had not obtained the mark of the accused upon it, but the Sessions Judge evidently thought that this omission was not fatal in itself, for he says that the argument of the pleader to that effect does not commend itself to him. It seems that the omission plus the prejudice that the Sessions Judge thinks was caused to the accused in his defence by the omission was the reason which led to the rejection of the confession, for the Sessions Judge says: 'The error, therefore, of the Magistrate in omitting to ask the acused to sign the statement was, having regard to the probable intention of the Legislature, of such a nature as may have seriously prejudiced the accused in his defence on the merits. It may have deprived the accused of the opportunity given him by the law, of denying the accuracy of the confession, and the statement is inadmissible in evidence under section 91 of the Evidence Act I of 1872 and under section 533 of the Code of Criminal Procedure (Act X of 1882), which so far from affording a remedy for a defect of this kind expressly excludes from the operation of the section errors which have injured the accused as to his defence on the merits."

It becomes, therefore, necessary to ascertain exactly what section 533 of the Code of Criminal Procedure means. In the present

case we have a confession recorded under section 364 tendered in evidence, but it is found that one of the requirements of the section has not been observed, *viz.*, the record is not signed by the accused. On this account the record is inadmissible in evidence. Under the provisions of section 91 of the Indian Evidence Act, oral evidence would be inadmissible to prove the terms of the confession, and this was the law under the Code of 1872 as regarded confessions taken otherwise than in the course of a preliminary inquiry. (See the case of *Bai Ratan*[1] and *Reg.* v. *Daya Anand and Ranchod Khalpo*[2].) The Code of 1882, however, has in section 533 introduced an important alteration. It expressly allows oral evidence to be given that the accused duly made the statement recorded, and it provides that notwithstanding any thing contained in the Indian Evidence Act, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits. This seems to me to be capable of but one meaning. I can see no ground for the nice distinction drawn in *Jai Narayan Rai* v. *The Queen-Empress*[3] between omissions to comply with the law and infractions of it. That ruling was doubted in *Lalchand* v. *Queen-Empress*[4], dissented from in *Queen-Empress* v. *Visram Balaji*[5], and I agree with Strachey, J., entirely on this point, and I think that section 533 is intended to apply to all cases in which the directions of the law have not been fully complied with.

The result is this. The record of the confession is inadmissible owing to a failure to comply with the law, and nothing can make it admissible, but parol evidence may be given of the terms of the confession, and those terms, if and when proved, may be admitted and used as evidence in the case. As regards confessions made and recorded by a Magistrate in the course of a preliminary enquiry, there does not seem to have been any material alteration in the law. Section 246 of the Code of 1872 permitted evidence to be given of the statement made where the record was informal. In the case of *Reg.* v. *Devi Dayal*[6], the Judges deal with such a confession and use it in evidence although it is not signed,

(1) (1873) 10 Bom. H. C. R. p., 166.
(2) (1874) 11 Bom. H. C. Rep., 11.
(3) (1890) 17 Cal., 862.
(4) (1891) 18 Cal., 549.
(5) (1896) 21 Bom., 495.
(6) (1871) 11 Bom. H. C. Rep., 237.

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holding that the defect had not in any way under the circumstances prejudiced the accused, and this, too, when there was no evidence adduced to prove the statement. I notice that the note by the editor of this report is very misleading, since it ignores the distinction that there was between the confession in the two cases it refers to, and erroneously calls them similar confessions. There is, however, a proviso to the section, namely, that the error has not injured the accused as to his defence on the merits. This is, of course, a question to be determined on the merits of each particular case, and it is impossible to lay down any rule on the subject. In the present case the Sessions Judge only says that the error may have deprived the accused of the opportunity, given him by the law, of denying the accuracy of the confession. It is, however, a matter of evidence whether he was actually so deprived or not. If, after the record had been made conformable to what the accused declared to be the truth, his signature to it was not taken by mere oversight, it is difficult to see how he could be prejudiced by the omission. It might be different if he had denied the accuracy of the statement as recorded, and if on that account his signature was not taken, though in that case the objection would be not so much one of prejudice as one of no confession at all. We observe that in the Sessions Court the accused denied making the statement. The Sessions Judge ought on this point to have taken the evidence of the kulkarni to whom was deputed the duty of asking the accused to put his mark to the record, and of the Magistrate who examined the accused, and have ascertained whether the accused duly and voluntarily made the statement recorded, and why his signature was not taken, and then decided whether or not the statement should be admitted.

As there has been no proper inquiry in the present case on the above points, and as the confession after being admitted in evidence has been held inadmissible on insufficient reasons, we reverse the order of acquittal, and direct that the accused be retried.

RANADE, J :—This is an appeal under section 417 from an order of acquittal passed by the Sessions Judge of Nagar, who, concurring with the assessors, found that the charges of murder and culpable homicide brought against the accused were not proved.

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The alleged murders took place on 1st May, 1897, when the victims, who were the wife and daughter of the accused, first disappeared. On 13th May, 1897, accused is alleged to have made a self-incriminating statement before the committing Magistrate, F. C., in which he admitted having in a fit of anger, struck his wife twice—once before and again after she had dashed the child with her on the ground. The statement was taken down in Maráthi by a clerk, who was examined as a witness in the case, in the presence of the Magistrate, who made an English memorandum of the same. The vernacular statement was not signed by the accused, nor did it bear his mark. According to the clerk, he read over the statement to the accused, who admitted its correctness, and then he made it over to a kulkarni to make a mark for the accused, but the kulkarni did not make the mark. The Sessions Judge held that this statement was inadmissible in evidence, and as accused denied all knowledge of the charge, and there was no other reliable evidence, the accused was acquitted and discharged. It was contended before us that under the circumstances the defect in the statement was cured by the evidence of the clerk, and that the Sessions Judge was in error in excluding this confession from his consideration. Section 533 lays down that, if the error had not injured the accused as to his defence on the merits, evidence may be taken to prove that the accused person duly made the statement in respect of which the record was defective. The Sessions Judge in this case was of opinion that the omission to obtain the signature or mark of the accused person was a defect which affected the defence on the merits, and he, therefore, held that the defect was not cured under the provisions of section 533. The point for consideration is thus whether the defect was only one of form which could be cured or was one which affected the merits of the defence. The decisions of this Court in *Reg* v. *Bai Ratan* [1] and the other case, *Reg.* v. *Daya Anand* [2], which followed that ruling, went the length of interpreting the provisions of the corresponding section of the old Act so strictly as to exclude all oral evidence in cases of defects in the record, represented by the failure of the accused to sign or make his mark, or when the statement was not taken down in the form of question and answer

(1) (1873) 10 Bom. H. C. Rep., 163. (2) (1874) 11 Bom. H. C. Rep., 44.

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(*Reg.* v. *Shivya*[1]) or when the statement was not authenticated by the Magistrate's endorsement of its accuracy. When the certificate was not recorded at the time, but was appended after some days, it was similarly held that the irregularity was one which made the confession inadmissible (*Empress* v. *Bapu Narsoo and Govinda Nathu*[2]). The strictness of these rulings apparently suggested the change in the wording of the present section 533. The other High Courts have not interpreted the old section with the same strictness. In *Empress* v. *Ramanayya*[3] the decision of this Court noted above (*Reg* v. *Shivya*) was not followed, and that High Court held that oral evidence was admissible. In *Empress of India* v. *Bhairon*[4], failure to append the memorandum in due form was held not to render the confession inadmissible. In the *Queen* v. *Kala Chand Pal*[5] similarly, the High Court of Calcutta sent the case back for the examination of the Magistrate with a view to remove the defects caused by non-compliance with the provisions of the old section 316. In *Empress* v. *Munshi Sheikh*[6] the High Court of Calcutta held that the defect represented by the taking down of the statement in the form of narrative, and not in the form of question and answer, did not prejudice the defence of the accused. The strictness of the ruling in *Jai Narayan Ra* v *The Queen-Empress*[7] was not approved by the same Court in *Lalchand* v. *Queen-Empress*[8] when the defect, in both cases, was represented by the answers being taken down in a language other than that in which the accused gave them to the Magistrate. In *Reg.* v. *Deva Dayal*[9], this Court held that failure to sign the statement did not affect the admissibility of it in evidence, if it did not prejudice the prisoner. The true principles which should govern such cases were clearly laid down in *Queen-Empress* against *Viran*[10]. As stated there, section 533 merely gives legal sanction to the maxim "*Omnia præsumuntur rite esse acta*". When no attempt has been made to comply with the provisions of the law, section 533 will

(1) (1876) 1 Bom., 279.
(2) (1882) 6 Bom., 283.
(3) (1878) 2 Mad., 5.
(4) (1880) 3 All., 338.
(5) (1875) 24 Cal. W. R., 20 (Cr. Rul.)
(6) (1882) 8 Cal., 616.
(7) (1890) 17 Cal., 862.
(8) (1891) 18 Cal., 599.
(9) (1874) 11 Bom. H. C. Rep., 237.
(10) (1886) 9 Mad., 224.

not render a confession admissible. Judging by this test, it cannot be said in the present case that the Magistrate made no attempt to comply with the provisions of the law. He made a memorandum in English. He put the questions and answers which were taken down in his presence by the clerk, and these were read to the accused, and admitted by him to be correct. The memorandum and certificate are all in proper form. The failure of the kulkarni to make the mark of the accused was apparently not noticed through inadvertence. It does not appear that there is any room for presuming, as the Sessions Judge has apparently done, that the accused might have changed his mind, and that admitting the oral evidence of the Magistrate and of the kulkarni under section 533 would prejudice the defence on the merits. It must be admitted that the clerk's evidence by itself was insufficient for the purposes for which it was given. The prosecution should have given the evidence of the Magistrate himself who put the question, and recorded the answer. It is also not clear how the prosecution could not find out the whereabouts of the kulkarni, who was asked by the clerk to make the mark for accused. Such further evidence appears to me to be clearly admissible under section 533, and in such a case as this, where the confession is the only reliable evidence, it seems to be necessary, in the interests of justice, that this evidence should be received, and the case retried. I would accordingly reverse the order of acquittal and direct such retrial under section 423.

APPELLATE CIVIL

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898.
March 21.

TOTAWA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* BASAWA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Inheritance—Daughters—Succession among daughters—The poorest daughter entitled to inherit the whole estate—Comparative poverty.

In the Presidency of Bombay, the principle of law which governs the succession of daughters *inter se* as heirs to their father's estate is, that though the Courts ought not to go minutely into the question of comparative poverty, yet where the difference in wealth is marked, the whole property passes to the poorest daughter.

* Second Appeal, No 1177 of 1897.

1898.

TOTAWA v. BASAWA.

SECOND appeal from the decision of A. Butterworth, District Judge of Dhárwár.

Suit for partition. The two plaintiffs were the sisters of the first two defendants, and they sued for a partition of their father's property consisting of three fields and a dwelling-house.

They alleged that he had died without male issue; that their mother had died two years before suit; and they claimed that on her death they and their sisters (defendants Nos. 1 and 2) were entitled to succeed to their father's property in four equal shares.

The third defendant was the son of defendant No. 1, and as he was in possession, he was made a party to the suit.

Defendants Nos. 1 and 2 pleaded (*inter alia*) that they were the poorest of the four sisters and were, therefore, entitled to inherit their father's estate to the exclusion of the plaintiffs, who were in affluent circumstances.

The Court of first instance found that all the sisters were married; that the respective husbands of the plaintiffs were possessed of lands and houses; that the husband of the first defendant was also in comfortable circumstances; that defendant No. 2 was a widow possessed of neither land nor house, and was the poorest of the four sisters. The Court, therefore, held that she alone was entitled to succeed to the property. Plaintiffs' claim was, therefore, rejected.

On appeal this decision was upheld by the District Judge. His reasons were as follows:—

"3. There is no doubt, I think, that the second defendant is much poorer than the plaintiffs. All the sisters were married before their mother's death, and it is admitted by the husbands of plaintiffs Nos. 1 and 2 that they own respectively (1) 59 acres of land and a house and (2) 36 acres of land and a house. The 36 acres belonging to the second plaintiff's husband were, however, it appears, under mortgage with possession (for a period of nine years) at the time of her mother-in-law's death. On the other hand, the second defendant seems to have been almost, if not quite, destitute at that time. The second plaintiff's husband admits that the second defendant's husband, who died three or four years before suit, had no land or house in the village; that she herself owns neither; and that she is the poorest of the sisters. The witness added that defendant No. 2 lives by selling butter; that she has moveable property worth Rs. 700 or 800; that he himself is as poor as she is; and that her husband

traded in cotton with a small capital of Rs. 300 or Rs. 400. Another witness says defendants Nos. 1 and 2 are the poorest of the sisters; that defendant No. 2 owns no house or land, and that her husband also was a poor man; but he adds that defendant No. 1 is as poor as defendant No. 2. Another witness gives similar evidence. The first defendant, too, declares that defendant No. 2 is poor and that because she is so poor, and has no house or lands, she (the first defendant) gave her a portion of the suit property. One of the plaintiffs' own witnesses has added his testimony to prove that the second defendant is the poorest of the sisters.

"4. As against the plaintiffs I think that the Subordinate Judge's finding, that the second defendant is entitled to the whole of the property, is justified by the evidence. The first plaintiff is clearly well-to do, and although the second plaintiff's husband's land is mortgaged, there is little doubt that she is considerably better off than the second defendant.

"5. The respective titles of the first and second defendants are not actually in suit now, but the evidence shows that the first defendant is much better off than the second defendant. The statements of certain witnesses to the effect that the first and the second defendants are on an equal footing as regards wealth, are obviously untrustworthy.

"6. The contention that, even if the second defendant is the poorest, the plaintiffs still have a right to demand a share, cannot be admitted in view of the circumstances of the case. No doubt, the Courts ought not to go minutely into questions of comparative poverty; but where the difference in the wealth is marked, as, I think, it is in this case, then the law, as it has been interpreted by authority, requires that the whole property shall pass to the poorer sister."

Against this decision the plaintiffs preferred a second appeal to the High Court.

M. B. Chaubal, for appellants (plaintiffs):—The general rule is that all daughters succeed to their father's property in equal shares. The only exception to this rule is that, if any of the daughters is absolutely indigent or destitute, she alone inherits the property to the exclusion of the others. The texts bearing on this subject show this beyond dispute: see Mayne's Hindu Law, para. 514. But, if all the daughters are more or less provided for, the Courts cannot inquire into the question of their comparative indigence or poverty, and must distribute the inheritance equally among all the daughters.

Daji Abaji Khare, for respondents (defendants):—It is found as a fact that defendant No. 2 is not only the poorest of all the sisters, but is absolutely without any property at all. She has

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no lands and no houses. She earns her living by selling milk, whilst her sisters own each between 60 and 40 acres of land and besides several houses. There can be no comparison between her condition and that of her sisters. That being the case, she alone is entitled to succeed to the whole of her father's estate—*Bakubai* v. *Manchhabai*[1]; *Polu* v. *Narotam*[2]; *Aulk Kumari* v. *Chandra Dai*[3]; *Srimati Uma Devi* v. *Gokoolanund*[4].

RANADE, J.:—In this case, the sole question for consideration is whether the Courts below have correctly laid down the principle of law which governs the succession of daughters *inter se* as heirs to their father's estate.

The two appellants and the first two respondents are full sisters, and all of them were married during their father's lifetime. The original claim was brought by the appellants to recover their half share in their father's lands and house, and the defence was that the first two respondents were entitled to their father's property in preference to the appellants, as they were the poorest among the sisters. Both the Courts below have found that respondent No. 2 was the poorest of the four sisters, and that she alone was entitled to succeed as heir to her father. The appellants' claim was accordingly rejected.

Mr. Chaubal, for the appellants, contended before us that it was only the absolutely indigent married daughter who had a preferential claim over her well-to-do sisters, and that when all the daughters are more or less provided for, there was no preference, and all shared equally. The lower appellate Court appears to us to have correctly laid down the principle of law when it stated that, though the Courts ought not to go minutely into the question of comparative poverty, yet where the difference in wealth is marked, the law requires that the whole property should pass to the poorest sister. The principle was first laid down in *Bakubai* v. *Manchhabai*[1], namely, that in this Presidency, as between married daughters, succession was regulated by their comparative endowment or non-endowment. The Sanskrit words used in the original texts for "endowed" and "unendowed" are "*sudhan*" (with wealth) and "*nirdhan*" (with-

(1) (1864) 2 Bom. H. C. Rep., 5 (A. C. J.)
(2) (1869) 6 Bom. H. C. Rep., 183 (A. C. J.)
(3) (1879) 3 All., 561.
(4) (1878) 5 I. A., 4.

wealth). It was accordingly ruled in *Poli* v. *Narotum*[1] comparative poverty was the sole criterion for settling the ns of the daughters among themselves. It is true that in *Mithila* country, no distinction is recognized between poor d rich sisters, and in the Bengal school the criterion is the tual or potential capacity of having male issue. This difference n the three schools is due to the diversity of the interpretation put upon the word "*apratishthita*," used in a text of Gautama, which has been translated "unprovided for" with wealth by some, and with children by other, commentators. In *Audh Kumari* v. *Chandra Dai*[2], a case which bears close resemblance to the present, this point was carefully considered. In that case, also, the dispute lay between four sisters, two of whom had brought separate suits, each for her half share of their father's property, against strangers who pleaded that there were two other sisters in indigent circumstances who were preferential heirs. These two sisters were subsequently joined as co-defendants. All the four sisters were married, and the Court held that as the plaintiffs were in much better circumstances than their sister-defendants, they were not entitled to succeed as heirs, and accordingly reversed the decree of the lower Court, which had ordered equal division as between the four sisters on the ground that none of them were absolutely indigent or beggars. In *Danno* v. *Darbo*[3] this same view was enforced in a contest between two married sisters, and it was further held that the words "provided for" did not necessarily mean provided for by the father, but that it was the equivalent of "possessed of means". Their Lordships of the Privy Council in *Srimati Uma Dayi* v. *Gokoolanund*[4] similarly held that the claim of the indigent or unprovided-for sister to maintain the suit was superior to that of her richer sister. The Courts below have thus correctly interpreted the law, and we see no ground to interfere. We accordingly confirm the decree of the lower Court and reject the appeal with costs.

Appeal dismissed.

(1) (1839) 6 Bom. H. C. Rep., 183.
(2) (1873) 2 All., 561.
(3) (1882) 4 All., 243.
(4) (1878) 5 I. A., 40.

APPELLATE CIVIL.

1898.
March 22.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BAI RAMBAI (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI MANI (ORIGINAL DEFENDANT), RESPONDENT.*

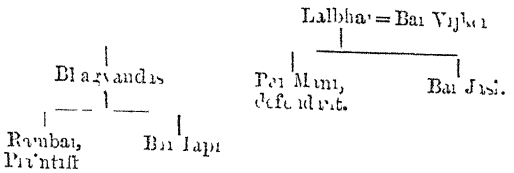
Hindu law—Gift—Gift of immoveable property—Delivery of possession not necessary if deed of gift be registered—Transfer of Property Act (IV of 1882), Secs. 123, 129—Registration.

The rule of Hindu law that delivery of possession is essential to complete a gift, is abrogated by section 123 of the Transfer of Property Act (IV of 1882).

Dharmadas Das v. Nityanand Dass(1) followed.

SECOND appeal from the decision of T. Walker, District Judge of Surat.

Suit for partition. The relationship of the parties will appear from the following pedigree:—



The property in dispute, both moveable and immoveable originally belonged to Lalbhai. His son Bhagvandas predeceased him, leaving two daughters, Rambai (the plaintiff) and Tapi.

Lalbhai died in January, 1891. By his will he bequeathed his property to his widow Bai Vijkor for life and after her death to his daughters and the daughters of his predeceased son in equal shares.

Bai Jasi died on 9th May, 1891, and Bai Vijkor on 24th March, 1891.

In 1895 the present suit was filed by Bai Rambai to recover by partition her share in the property in dispute.

Pending the suit, Bai Tapi died. In accordance with her directions her husband executed a deed of gift conveying her share of the property to the plaintiff. This deed was duly registered.

* Second Appeal, No. 1095 of 1897.

(1) (1887), 11 Cal., 446.

1898.

BAI RAMBAI v. BAI MANI.

On the strength of this deed of gift, plaintiff claimed to recover Bai Tapi's share as well as her own.

Defendant Bai Mani pleaded that the gift of Bai Tapi's share was invalid, as it was not accompanied by delivery of possession.

The Court of first instance held that under sections 122 and 123 of the Transfer of Property Act (IV of 1882) delivery of possession was not necessary to validate the gift. A decree was, therefore, passed, awarding to the plaintiff Bai Tapi's share as well as her own.

On appeal the District Judge held, on the authority of *Vasudev Bhat* v. *Narayan Daji*[1], that the gift was invalid, as actual possession was not given to the donee. He, therefore, varied the decree by awarding to the plaintiff her $\frac{1}{4}$th share only in the property in suit.

Against this decision plaintiff preferred a second appeal to the High Court.

K. M. Jhaveri (with *G. M. Tipat'u*) for appellant.—Under the provisions of section 123 of the Transfer of Property Act (IV of 1882), delivery of possession is not necessary to validate a gift of immoveable property. The transfer can be effected by a deed duly registered—*Dharmodas Das* v. *Nistarini Dasi*[2].

Ganpat Sadashiv Rao, for respondent.—Under the Hindu law transfer of possession is necessary to give validity to a gift of immoveable property. Registration does not give the donee either actual or constructive possession, and cannot, therefore, be treated as equivalent to delivery of possession—*Vasudev Bhat* v. *Narayan Daji*[1]. This rule of Hindu law is not affected by section 123 of the Transfer of Property Act. Section 129 of the Act leaves the rule of Hindu law on this subject untouched.

PARSONS, J.:—We need not discuss the question of consent of co-parceners, because we are not dealing with the case of a gift by a co-parcener in undivided family property. The parties are beneficiaries under the will of Lalbhai, who left his property to his widow for her life and then to be divided among his children and grandchildren, that is, to the parties in this suit, one of

(1) (1882) 7 Bom., 131. (2) (1887) 14 Cal., 446.

1898.

BAI RAMBAI v. BAI MANI,

whom has given her share to the plaintiff, who sues for this as well as for her own share. To such a transfer the provisions of section 44 of the Transfer of Property Act apply and the plaintiff has the right to enforce a partition of the property. This has hardly been contested in argument before us by the pleader for the respondent, who has directed his attack upon the validity of the gift to the point that the gift was not accompanied by delivery of possession. We think that this was not necessary under the law then and now in force.

Section 123 of the Transfer of Property Act, 1882, provides that the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. This has been done. Nothing is said about delivery of possession, and if this was an additional requirement it surely would have been so stated. It was argued that no mention of it was necessary, because section 129 preserves all the rules of Hindu law, but it only does so save as provided by section 123. The Calcutta High Court have construed these sections in the case of *Dharmodas Das* v. *Nistarini Dasi*[1] and decided that the Hindu rule of law, that delivery of possession is essential to complete a gift, has been abrogated by them. That case was decided as long ago as 1887, and its correctness has not, as far as we are aware, ever been doubted, and the Legislature has not amended the Act, as we think it would have done had the decision been contrary to the intended provision of the law upon such an important point. We follow that decision, and, therefore, hold the gift to be a valid transfer of the share.

We vary the decree of the lower appellate Court by substituting $\frac{1}{2}$ for $\frac{1}{4}$th share and give the appellant her costs in this Court. The costs in the Court of first instance and in the lower appellate Court will be in the proportion of $\frac{1}{2}$ to $\frac{2}{3}$ as between the parties in those Courts.

[1] (1887) 14 Cal., 446.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

MURIGEYA (ORIGINAL DEFENDANT), APPELLANT, *v.* HAYAT SAHEB AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1898. *March* 22.

Civil Procedure Code (Act XIV of 1882), *Secs.* 244, 278 *to* 283—*Questions arising between the decree-holder and the representatives of the judgment-debtor—Claims to attached property where representative judgment-debtor claims to hold the attached property as trustee of third party—Execution of decree.*

The plaintiffs sued for a declaration that certain property was liable to be attached in execution of a decree obtained by them in Suit No 591 of 1888 against the estate of one Gulaya, deceased, who had been the head of a *math* situate in the Dhárwár District. The property had been attached in execution, but the defendant, who was Gulaya's successor in office, had obtained the removal of the attachment on the ground that the property belonged to the *math* and not to Gulaya personally, and was not, therefore, liable to satisfy the decree. The plaintiffs thereupon brought this suit. The lower appellate Court passed a decree for the plaintiffs and granted the declaration. On second appeal it was contended that under section 244 of the Civil Procedure Code (Act XIV of 1882) the question ought to have been decided in execution of the decree in Suit No. 591 of 1888, and that a separate suit would not lie.

Held, on the merits, that the decree of the lower appeal Court should be reversed and the suit dismissed.

Per RANADE, J.:—Where the representative of a judgment-debtor puts forward a personal claim to property which is attached as asse's of the judgment-debtor in his hands, the investigation of the claim must be made in execution under the provisions of section 244 of the Code of Civil Procedure (Act XIV of 1882). But where he asserts that he holds the property in trust for, or on behalf of, or as manager of some third person or body of persons, or of a religious charity or institution, the claim must be investigated under the provisions of sections 278 to 283, and the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit.

Per PARSONS, J.:—Sections 278 to 283 of the Code of Civil Procedure have no reference to any claim preferred or objection made by any person who is on the record as a party to the suit. Whenever a question arises between the representative of a judgment-debtor on the record (whether originally sued as such or added before or after decree) and the decree-holder as to whether property in the hands of the representative was of the assets of the deceased or not that question must be determined by order of the Court executing the decree under the provisions of section 244.

* Second Appeal, No. 1200 of 1897.

1898.

MURIGEYA v. HARIAT SLUPE.

SECOND appeal from the decision of L. Crump, Assistant Judge of Dhárwár.

One Gulaya was the *Swami* or spiritual head of a *math* situate in the Dhárwár District. He died in 1874. The defendant was his disciple and successor in office.

The plaintiffs obtained a decree (in Suit No. 591 of 1888) against the assets of the deceased Gulaya in the hands of the defendant.

In execution of this decree, plaintiffs attached certain lands as forming part of the deceased's estate.

The defendant objected to the attachment on the ground that the lands were the property of the *math* and not the personal property of the deceased Gulaya. This objection prevailed and the attachment was raised.

Thereupon the plaintiffs in 1894 filed the present suit to obtain a declaration that the lands were liable to attachment and sale in execution of their decree.

The defendant pleaded (*inter alia*) that the lands belonged to the *math*; that the deceased Gulaya had no personal interest in them, and that under section 244 of the Code of Civil Procedure (Act XIV of 1882) the question ought to be decided in execution of the former decree, and that the present suit was not maintainable.

The Subordinate Judge following the ruling in *Seth Chand Mal* v *Durga Dei*[1] held that the suit was not barred by section 244 of the Civil Procedure Code. He further held that the lands in dispute were attached to the *math* and that the deceased Gulaya did not hold them in his personal capacity. He, therefore, held that the lands were not liable to attachment and sale in execution of the plaintiff's decree in Suit No. 591 of 1888. This suit was accordingly dismissed.

On appeal, the Assistant Judge held that the lands were the personal inám of the deceased Gulaya, and as such liable to be attached and sold in execution of the plaintiff's decree. He, therefore, reversed the first Court's decree and granted the declaration sought.

(1) (1889) 12 All, 313.

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Against this decision defendant preferred a second appeal to the High Court.

Manekshu Jehangirshah, for appellant (defendant) :—Section 244 of the Code of Civil Procedure is a bar to the present suit. The order passed in the execution proceedings for the removal of the attachment was an order between the parties to the suit and their legal representatives, and one relating to the execution of the decree. It falls, therefore, under clause (*c*) of that section. The only remedy, therefore, open to the party aggrieved by the order was to have it set aside in appeal and not by a separate suit—*Chowdhry Wahed Ali* v. *Mussamut Jumaee* [1]; *Nimba* v. *Sitaram* [2]; *Lallu* v *Lallu* [3], *Punchanun* v. *Rubia Bibi* [4]; *Ramunni* v. *Kunju* [5]; *Seth Chand Mal* v. *Durga* [6].

Assuming that the suit is not barred by section 244 of the Code, we contend that the decision in *Jamal* v. *Murgaya* [7] is applicable to the present case, and the lands in dispute must be held to belong to the *math*, as they stand on the same footing as the lands which were the subject-matter of that suit.

Daji Abaji Khare, for respondents (plaintiffs) :—The plaintiffs seek to attach property, which they allege belongs to their deceased judgment-debtor. The defendant objects to the attachment on the ground that it is trust property. The defendant does not claim the property as his own, but sets up a *jus tertii*. His objection to the attachment was made, not on his own behalf but on behalf of the *math* of which he is the trustee. The case thus falls under section 278 and not under section 244 of the Code of Civil Procedure. If so, the order for removal of the attachment can only be set aside by a regular suit as provided by section 283—*Roop Lall Dass* v. *Bekani* [8]; *Rajrup* v. *Ramgolam* [9]; *Seth Chand* v. *Durga Dei* [10], *Sudindra* v. *Budan* [11].

RANADE, J. :—In this case the respondents-plaintiffs were mortgagees of certain land under a mortgage executed by one Gulaya,

(1) (1872) 11 B L. R, 149.
(2) (1885) 9 Bom., 45.
(3) P. J. for 1896, p 754.
(4) (1890) 17 Cal, 711.
(5) (1886) 10 Mad, 117.
(6) (1889) 12 All., 313.
(7) (1885) 10 Bom., 74.
(8) (1888) 15 Cal., 437.
(9) (1888) 6 Cal, 1
(10) (1889) 12 All., 313.
(11) (1885) 9 Mad., 80.

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who was *jangam guru* of the appellant. On Gulaya's death, appellant, as his disciple and successor in the *matha*, brought a suit to eject the respondents from the possession of the lands, and obtained a decree in his favour, the mortgage being held to be invalid, and not binding on the appellant. The respondents thereupon sued for the money due on the mortgage-bond, and obtained a decree against the personal assets of the deceased Gulaya in the hands of the appellant. In execution of this decree, lands other than those mortgaged were attached as being the *jat inám* property of the deceased Gulaya, but the attachment was removed on the application of the appellant.

Thereupon the respondents brought the present suit for a declaration that the lands were *jat inám* of Gulaya, and liable to be attached and sold in respect of his debts, and this claim was disallowed in the Court of first instance. The Assistant Judge in appeal reversed that decree, and gave the declaration sought by the respondents.

The appellant has preferred this second appeal from the decree of the Assistant Judge, and Mr. Manekshah, pleader for the appellant, raised the objection that the respondents had no right to bring a separate suit, and that their remedy was by way of appeal from the order passed against them in the miscellaneous execution proceeding. It was contended that the order was an order between the parties to the suit and their legal representatives relating to the execution of a decree, and as such fell within clause (*c*) of section 244, and not under section 280, and no separate suit could be brought to set aside the order. The question for consideration is thus whether the order in the miscellaneous proceedings must be regarded as an order relating to a question arising between the parties and their legal representatives in the matter of the execution, discharge, or satisfaction of a decree, or whether it is an order under section 280, in which latter case a separate suit is maintainable.

The distinction between the two sets of orders was considered by the Allahabad High Court in *Bahori Lal* v. *Gauri Sahai* (1), and by the Calcutta High Court in *Punchanun Bundopadhya* v.

(1) (1883) 8 All., 626.

Rabia Bibi (1). In the last of these cases, it was laid down that section 244 must be liberally construed, and whatever diversity of opinion might have at one time prevailed on this point, it is now settled law that all objections by the legal representative of a judgment-debtor that the attached property is not part of the assets of the deceased judgment-debtor available for satisfaction of the decree against him, but belongs to the legal representative, in his own independent private right, must be disposed of under section 244—*Chowdhry Wahed Ali* v. *Mussamut Jumaee* (2); *Ravunni* v. *Kunju* (3); *Nimba* v. *Sitaram* (4); *Lallu Tribhowan* v. *Lallu Bhagwan* (5); *Rajrap Singh* v. *Ramgolam Roy* (6); *Panchanun Bundopaahya* v. *Rabia Bibi* (7); *Seth Chand Mal* v. *Durga Dei* (8). At the same time, an exception has been recognized in the case of objections raised by the legal representative as trustee for a religious endowment or charity, that the property attached is not liable to be sold in execution of a decree against his predecessor-in-title. Such objections have always been considered as made under section 278, and from orders passed on such applications there is no appeal, and a separate suit is the only remedy. This distinction is based on the wording of section 280, which expressly applies not only to cases where the property attached is not in the possession of the judgment-debtor, or of some person in trust for him, but also to cases in which the judgment-debtor's possession was not on account of himself, or as his own property, but on account of or in trust for other persons. The incumbent for life of devasthán or *wakf* property comes within this latter class of cases.

When a judgment-creditor attaches such property in execution of his decree against the incumbent for life, and the legal representative objects on the ground that it is trust property, a different set of issues arise which have no relation to the execution, discharge, or satisfaction of the decree as between the parties to it. Besides, even if the legal representative remains quiet, the attachment might be with equal efficacy questioned by a third

(1) (1890) 17 Cal., 711.
(2) (1872) 11 Beng L R., 149.
(3) (1886) 10 Mad., 117.
(4) (1885) 9 Bom., 458.
(5) P. J. for 1896, 754.
(6) (1888) 16 Cal, 1.
(7) (1890) 17 Cal., 717.
(8) (1889) 12 All, 313.

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party interested in the worship of the shrine, and the legal representative thus really asserts a *jus tertii* in such matters, *i. e.*, rights of persons who are not parties to the decree, or their representatives. The force of these considerations has been acknowledged in a large number of decisions. In *Sudindra* v. *Budan*[1], it was expressly laid down that a new trustee of a *matha* could not raise in execution proceedings any question about the non-liability of the *matha* property to be attached in execution of a decree against the previous trustee. In *Nath Mal Das* v. *Tajammul Husain*[2] a suit by a Mutavalli judgment-debtor to have it declared that certain property attached in execution of a decree against him was *wakf* property, was allowed on the ground that such a suit was brought by him in a character separate from his private capacity. The cases of *Shankar Dial* v. *Amir Haidar*[3] and *Nimaye Churn* v. *Jogendro Nath*[4] are still earlier authorities on the same point. In *Roop Lall Dass* v. *Behani Meah*[5] it was held that when a judgment-debtor objected to the attachment of property on the ground that it was *wakf*, the case fell under section 280, and not section 244. In *Rajrup Singh* v. *Ramgolam Roy*[6], Mr. Justice Wilson expressly recognized this exception to the general rule laid down by him, as resting on considerations which did not apply to cases falling under section 244. In *Seth Chand* v. *Durga Dei*[7], a similar exception was made on the same grounds.

In our own Presidency, the point has not yet been formally decided. In *Gangadhar Bhikaji* v. *Gangadhar Trimbak*[8], the point was incidentally raised, but the case was decided on other grounds. In *Shri Ganesh Dhamidhar* v. *Keshavrao*[9], an opinion was expressed that there was nothing to prevent a succeeding trustee of devasthán property from questioning in execution proceedings the alienations made by a previous trustee. On the authority of this case, it was laid down in *Venubai* v. *Dhondo*[10] that a manager of sansthán might dispute the validity of a

(1) (1885) 9 Mad., 80.
(2) (1884) 7 All., 36.
(3) (1880) 2 All., 752
(4) (1874) 21 Cal. W. R., 365.
(5) (1888) 15 Cal., 437.
(6) (1888) 16 Cal., 1.
(7) (1889) 12 All., 313
(8) P. J. for 1891 207.
(9) (1890) 15 Bom., 625
(10) P. J. for 1892, p. 250

decree passed against his predecessor in execution proceedings without being obliged to bring a separate suit. None of these decisions go to the length of ruling that such new trustee or manager is obliged to raise his objection in execution, and that no separate suit will lie.

In the present case, the suit was brought, not by the new manager or trustee of the *matha*, but by the judgment-creditor. His right to bring such a suit rests on the same foundation as that of the legal representative or successor of the judgment-debtor in the incumbency of the devasthán or charity. It may, therefore, be safely laid down that the respondents' suit in this case was properly instituted. I would therefore, overrule the objection raised by the appellant's pleader.

On the merits, the case must follow the ruling in *Jamal Saheb* v. *Murgaya Swami* [1], which was a decision between the parties to this suit in respect of other lands, but the contentions of the parties were virtually the same as in the present case. The nature of the tenure of the lands must depend upon the terms of the inám settlement made in regard to it. The extracts clearly show that both the lands are attached to the Virakta *matha*, and that both Gulaya and appellant are only vahivatdars. The statement made by Gulaya's *guru* before the Inám Commissioner is a self-serving statement, and as such cannot be received as evidence so as to destroy the effect of the trusts created by the Government grant.

Under these circumstances, following the ruling in *Jamal Saheb* v. *Murgaya Swami* [2], I would reverse the decree of the District Judge, and restore that of the Court of first instance, with costs throughout on the respondents.

PARSONS, J.—My learned colleague has fully stated the facts and mentioned all the cases which bear upon the first point that was argued before us and has come to the conclusion that, where the representative of a judgment-debtor puts forward a personal claim to property which is attached as assets of the judgment-debtor in his hands, the investigation of the claim must be made

(1) (1875) 10 Bom., at p. 10. (2) (1885) 10 Bom., 34.

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in execution under the provisions of section 214 of the Code of Civil Procedure, but that, where he asserts that he holds the property in trust for, or on behalf of, or as manager of, some third person or body of persons or a religious charity or institution, the claim must be investigated under the provisions of sections 278 to 283, and the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit. He holds, therefore that the present suit has been properly brought, and that the Courts below had jurisdiction to hear and determine the suit and the appeal.

I do not agree with this, but I do not consider it necessary or advisable to dissent therefrom, seeing that, first, this litigation dates from 1888, the decree sought to be executed was passed in 1892, and that this suit was filed in 1894, and, secondly, that in this second appeal we are dealing with the appellate decree in appeal of the same Court as would have heard the appeal from the order in execution, so that, if we reversed the present proceedings and referred the respondents to an appeal from the order, the second appeal to this Court would be precisely the same as this and would have to be decided on the very same materials, and with the same result. I shall, therefore, content myself with placing on record my opinion that sections 278 and 283 have no reference to any claim preferred or objection made by any person who is on the record as a party to the suit. If this were not so, it would not have been necessary to have used the general words in section 278 'as if he was a party to the suit." I do not see that any distinction can be drawn from the fact that the words used in section 280 "on account of or in trust for some other person" are joined to the words "not on his own account or as his own property" by the word 'but". These words, I think, refer only to the nature of the proof to be adduced and the case to be established. In my opinion, whenever a question arises between the representative on the record (whether originally sued as such or added before or after decree) and the decree-holder, as to whether property in the hands of the representative was of the assets of the deceased or not, that question must be determined by order of the Court executing the decree under the provisions of section 214.

I admit that the balance of authority seems opposed to this view, but I think that the point has not received the attention it deserves. In most of the cases cited, the claim was of a personal nature and there was an opinion only expressed as to the other claim. No doubt the decision in *Sukh Chand Mal* v. *Durga Dei*[1] is distinctly contrary to my opinion, but the decision in *Kuriyali* v. *Mayan*[2] is, I submit in favour of it, for there the claim in respect of two parcels of land was that they were tarvad property which the deceased judgment-debtor had no power to alienate and of which the representative was then in possession as the manager of the tarvad. I lay stress on this latter case because it was quoted with approval by their Lordships of the Privy Council in *Prosunno Coomar* v. *Kasi Das*[3]. I also cite in my favour the opinion of O'Kinealy, J., in *Purchanun Bundopadhya* v. *Rebia Bibi*[4] to the effect that sections 278 to 283 do not cover the case of any contest between parties to the suit or their representatives on the record of the suit in regard to the execution, discharge or satisfaction of a decree, whether the claim set up be a claim on the ground that the property is that of a person on the record or belongs to any third party. It seems to me (he says) that the effect of the decision between such parties is, that the right to enforce or oppose execution against the property in dispute is decreed and finally determined under section 244, subject to the result of such appeal as is given to them by law. Prinsep, J., was of the same opinion.

Upon the next point, I agree with my learned colleague. The Assistant Judge wrongly placed the *onus* of proving the inalienability of the lands in suit upon the appellant. The statement in Exhibit 20, said by the Assistant Judge to be that of Gulaya, but which really is the statement of his predecessor in management, Shidlinga, that the lands were his, ought not to have been given any weight to, especially when taken along with the other statements made by him as to how the lands were acquired. It is clear from the Exhibits 56, 57, 42 and 43 that the lands belonged to the *math* and were not the private inám property of any manager, much less of Gulaya. The *ratio decidendi* adopted

(1) (1889) 12 All., 313.
(2) (1883) 7 Mad., 255.
(3) (1892) 19 I. A., 166
(4) (1890) 17 Cal., 711.

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in the case between the same parties reported at I. L. R., 10 Bom., p. 34, though it deals with other lands of the *math* is applicable to these lands, the title to which rests upon exactly the same basis. The decision of the Subordinate Judge in this case is undoubtedly correct, and it is only by a clear error of law that the Assistant Judge has come to a different finding.

We reverse the decree of the lower appellate Court and restore that of the Court of first instance, with costs throughout on the respondents.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898.
March 22.

GOVIND (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGAJI (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act (*XV of* 1877), *Sch. II, Art.* 138—*Article applicable to suits by assignees of auction-purchaser—Assignee of auction-purchaser.*

Article 138 of the Limitation Act (XV of 1877) is not limited to suits by the auction-purchaser himself but applies also to suits by his assignees.

Limitation runs from the date of the sale.

Mohima Chunder v. *Nobin Chunder*(1) dissented from.

SECOND appeal from the decision of Ráo Bahádur Thakurdas Mathuradas, Assistant Judge of Ratnágiri.

The defendant Gangaji Anaji Ghane was the owner of certain land which was sold on the 5th March, 1884, in execution of a decree obtained against him. It was purchased by one Atmaram Janardhan Desai.

The sale was confirmed on 30th May, 1884, but Atmaram was not put into possession.

On the 19th July, 1890, Atmaram sold his rights as auction-purchaser to the plaintiff.

On the 29th May, 1896, plaintiff filed the present suit to recover possession of the land from defendant.

The Court of first instance dismissed the suit as barred by limitation under article 138, Schedule II, of Act XV of 1877, as

* Second Appeal, No. 1187 of 1897.

(1) (1895) 23 Cal., 49.

the suit was filed more than twelve years after the date of the court-sale (5th March, 1884).

This decision was upheld, on appeal, by the Assistant Judge. His reasons were as follows:—

"The question is whether the period of limitation is to be counted from the date of sale under article 138 of Schedule II of the Limitation Act, 1877, or from the date of the confirmation of the sale, that being the date on which the plaintiff alleges that his vendor became entitled to get possession of the property in suit. Neither the plaintiff nor his vendor was ever put into possession of the property under the sale certificate, and the possession has all along remained with the judgment-debtor, *viz.*, the defendant. In the case of *Mohima* v. *Nobin* (I. L. R., 23 Cal., 49) the Calcutta High Court held that the period was to be computed, in a case like this, from the date of the confirmation of the sale, the suit not being by an auction purchaser, but by an assignee from him. On the other hand, the Madras High Court held that the period was to be calculated from the date of the sale under article 138—*Arumuga* v. *Chockalingam* (I. L. R., 15 Mad., 331). In the opinion of the Calcutta High Court, the assignee of the auction-purchaser became first entitled to possession when the sale was confirmed and the period of twelve years was to be counted from that date under article 136. With every respect for the Judges who decided the case of *Mohima* v. *Nobin*, I am of opinion that there is no reason why article 138 should apply to the auction-purchaser and article 136 to his assignee suing for possession. I think both should be governed by article 138, and hold that the suit is barred."

Against this decision plaintiff preferred a second appeal to the High Court.

V. G. Bhandarkar, for appellant.

There was no appearance for the respondent.

PARSONS, J.:—We prefer the decision of the Madras High Court, *Arumuga* v. *Chockalingam* [1], to that of the Calcutta High Court, *Mohima Chunder* v. *Nobin Chunder* [2]. We think that the learned Judges of the latter Court construed the article (138) of the Limitation Act too strictly when they held that it was limited to suits by the purchaser himself and did not apply to suits by his assignees. We can see no valid reason why it should not include his assignees, who stand in his shoes and ordinarily have, as such, no rights greater than that possessed by him. The same line of reasoning apparently would exclude his heirs also. We dismiss the appeal.

(1) (1892) 15 Mad., 331. (2) (1895) 23 Cal., 49.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898
March 24.

KALA GOVIND v. THE MUNICIPALITY OF THA'NA.*

Municipality—Bombay District Municipal Act (Bom Act VI of 1873), Sec. 18—Re-erection of a structure formerly existing not within the section.

Section 18 of the Bombay District Municipal Act (Bom Act VI of 1873) refers to the erection of a thing for the first time, and not to the re-erection of an old structure which had been taken down for a temporary purpose only.

The accused was the owner of a shop in a public street at Thána. The shop had planks attached to it in front, overhanging a public gutter. These planks had been in existence before the District Municipal Act came into operation at Thana. In April, 1897, the planks were temporarily removed under the orders of the plague authorities. The plague having ceased, the accused replaced the planks in October, 1897, without the permission of the municipality. For this he was prosecuted and fined under section 48 of Bombay Act VI of 1873.

Held, reversing the conviction and sentence, that the refixing of the planks was not an "erection" within the meaning of section 48 of the Act.

APPLICATION under section 435 of the Code of Criminal Procedure (Act X of 1882).

The applicant was prosecuted by the Municipality of Thána under section 48 of Bombay Act VI of 1873 for causing an obstruction to the public road under the following circumstances.

The applicant was the owner of a shop in a public thoroughfare at Thana.

The shop had planks attached to it in front to serve the purpose of a platform, where the owner sat and on which he exposed his goods for sale.

The planks overhung the public gutter and had been in existence before the District Municipal Act of 1873 came into force at Thána.

In April, 1897, the planks were temporarily removed under the orders of the plague authorities. In October, 1897, after the epidemic had subsided, they were refixed without the permission of the municipality.

For this act the present prosecution was instituted against the applicant under section 48 of Bombay Act VI of 1873.

* Criminal Revision, No. 51 of 1898.

1898.

KALA COVIND v. THE MUNICIPALITY OF THA'NA.

Ráo Bahádur A. G. Kotwal, Magistrate First Class at Thána, convicted the accused and sentenced him to pay a fine of Rs 5, or in default to suffer five days' simple imprisonment.

Against this conviction and sentence the applicant moved the High Court under its revisional jurisdiction.

Trimbak Ramchandra Kotwal for the applicant.

Ráo Sáheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

PARSONS, J. —The applicant owns a shop in the main street at Thána. As is very commonly the case with such shops, there were planks attached to it in front which extended over the gutter and formed a sort of shelf or platform, on which the owner could sit and display his wares. No doubt while they thus greatly increased the dimensions of the shop, they were an encroachment upon the public road. By reason, however, of their having been lawfully erected before the District Municipal Act VI of 1873 came into operation in Thána, the municipality could only have removed the planks after making reasonable compensation to the owner as provided for by section 42 of the Act. In April last, the plague authorities, under the very wide powers vested in them by law, caused the planks to be removed, in order, we presume, to be able more effectively to flush and keep clear the gutter of the street. In October last the plague having ceased, and all prohibitions and restrictions of the plague authorities having been removed, the applicant refixed the planks, and for this he has been prosecuted and fined under section 48 of the Act, in that after the Act came into operation he had erected what was an obstruction in the public street.

The conviction is, we think, illegal. We must construe the words used in section 48 of the Act as referring to the erection of a thing for the first time, and not to the simple re-erection of an old structure, which had been taken down for a temporary purpose only. This view receives support from the decisions of this Court upon the meaning of the word "erect" used in section 33 of the same Act (Criminal Ruling 63 of August 30th, 1888, and *Krishnaji Narayan Pokshe* v. *The Municipality of Tasgaon*)[1]. We find that the same construction of a very

[1] (1893) 18 Bom., 647.

1898.

KALA GOVIND v. THE MUNICIPALITY OF THA'NA.

similar provision in their local enactments has been taken by the Calcutta High Court in *Eshan Chunder* v. *Banku Behari Pal* (1), and by the Madras High Court in *Municipal Council, Tanjore* v. *Visvanatha Rau* (2). For this reason we reverse the conviction and sentence.

(1) (1897) 25 Cal., 160. (2) (1897) 21 Mad., 4.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898. *April* 4.

GOPAL BALKRISHNA KENJALE (ORIGINAL PLAINTIFF), APPELLANT, *v.* VISHNU RAGHUNATH KENJALE AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Adoption—Adoption by a daughter-in-law of A after the estate has vested in A's widow—Permission by A to adopt—Non-consent of widow—Divesting of estate once vested—Widow's authority to adopt in Bombay—Daughter-in-law must have permission—Co-widows—Adoption by one co-widow—Adoption of a son older than adoptive mother.

An adoption cannot divest a person of an estate which has once vested in him, unless such adoption is made with his consent. An exception to this rule is where a co-widow adopts. Such an adoption will divest the younger widow of her estate. Another exception is where a daughter-in-law adopts with the authority of her father-in-law, who is head of the family, as in *Vithoba* v. *Bapu* (1).

Unless prohibited expressly or by implication, a widow in the Presidency of Bombay has authority to adopt, but a daughter in-law, *i.e.*, the widow of a predeceased son, must be specially authorized by her father-in-law in order that she may make a valid adoption binding as against the heirs of her father-in-law.

Sakubai was the widow of Balkrishna, who died in 1877 in the life-time of his father Raghunath. Fourteen years later, *viz.*, in 1891, Raghu died, leaving a widow Saibai, who succeeded to his estate as his heir. In March, 1892, Sakubai adopted the plaintiff Gopal, who was older than herself, as son to her husband, alleging that she had Raghu's permission to do so. The plaintiff sued for a declaration that as adopted son of Balkrishna he was entitled to succeed as heir to the property of Raghu, as against the defendant Vishnu, who claimed to have been adopted by Saibai as son to Raghu. The lower appellate Court disallowed the plaintiff's adoption on the grounds (1) that Saibai had not consented to it, and (2) that the plaintiff was older than his adoptive mother Sakubai.

* Second Appeal, No. 957 of 1897.

(1) (1890) 15 Bom., 110.

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Held (confirming the decree of the lower Court), that as the adoption of the plaintiff Gopal was made by Sakubai without proper authority and without Saibai's consent, it was inoperative and invalid. As Saibai did not give her consent to the plaintiff's adoption, that adoption did not divest her of her exclusive right to succeed as heir of Raghu.

Semble—The fact that an adopted son is older than the adopting mother does not make his adoption invalid. The rule prescribing a difference of age in favour of the adopting mother is only directory and not mandatory.

SECOND appeal from the decision of Khán Bahádur M. N. Nanavati, additional First Class Subordinate Judge with appellate powers.

The plaintiff sued for a declaration that he was the adopted son of one Balkrishna Raghunath and as such entitled to the estate of Balkrishna, and of Balkrishna's father, one Raghunath Ganesh.

Balkrishna had died about 1877 in the life-time of his father (Raghu) and had left a widow named Sakubai. Fourteen years later, *viz.*, on 13th December, 1891, Raghu died and left a widow named Saibai (defendant No. 2).

The plaintiff alleged that before he died, Raghu, with Saibai's consent, gave his daughter-in-law Sakubai permission to adopt a son to her (Sakubai's) husband Balkrishna, and that she accordingly had adopted him (the plaintiff) on the 3rd March, 1892, in the presence and with the consent of Saibai. He further alleged that on the 7th March, 1892, Sakubai executed an adoption-deed which was duly signed.

As evidence of Raghu's permission to adopt, the plaintiff relied upon a letter (Exhibit 72) written by Raghu to Sakubai's father, dated 7th December, 1891, the material part of which was as follows :—

"I am suffering from fever for the last five or six days and I feel very weak. Consequently you should come to Gulunche with Annapurnabai, as we want to give a boy in adoption to Sakubai as previously arranged between you and us. I had a mind to effect the adoption in the month of Shrávan last, but as my wife had to leave this place on account of my father-in-law's death, the adoption did not take place. I have sent for my wife and you should all come here, when an auspicious day will be fixed and the ceremony will be performed."

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Defendants Nos. 1 and 2 (Vishnu and Saibai) contended that Sakubai had no right to adopt, and they denied that she had got Raghu's permission to do so. They alleged that the right to adopt was Saibai's, who had succeeded as heir to her husband Raghu; that in exercise of that right, and carrying out Raghu's wish, she had duly adopted the first defendant Vishnu on the 25th November, 1892. They further alleged that the plaintiff was not fit to be adopted by Sakubai, as he was older than she was.

The Court of first instance passed a decree for the plaintiff, holding that he had been duly adopted by Sakubai with Raghu's permission, though without Saibai's consent. It also held that the fact of the plaintiff being older than his adoptive mother Sakubai did not affect the adoption, and that the result of the plaintiff's adoption with the permission of Raghu was to divest Saibai (defendant No. 2) of her husband's estate which on his death had vested in her.

On appeal the Judge reversed the decree and rejected the plaintiff's claim. He was of opinion that Raghu's intention with regard to plaintiff's adoption died with him and he held that plaintiff's adoption was invalid on the grounds that Saibai did not consent to it and that the plaintiff was older than his adoptive mother Sakubai.

The plaintiff preferred a second appeal to the High Court.

P. P. Khare, for the appellant (plaintiff):—Sakubai clearly had Raghu's permission to adopt. That being so, the consent of Saibai (defendant No. 2) was not necessary. The fact that plaintiff was older than Sakubai, is immaterial. An adoption is made to the father and not the mother—*Bhagvandas* v. *Rajmal* [1]; West and Bühler (3rd Ed.), pp. 971, 973, 987. In Bombay there is no restriction as to age in cases of adoption. A minor or a bachelor can adopt. A married man may be adopted—Tagore Law Lectures, 1888, pp. 361, 365; *Rale Vyinkatrav* v. *Jayavantrao* [2]; *Nathaji* v. *Hari* [3]; *Dharma* v. *Ram-*

[1] (1873) 10 Bom. H. C. Rep., 241. (1867) 4 Bom. H. C. Rep., 191 (A. C. J.)

[3] (1871) 8 Bom. H. C. Rep., 67 (A. C. J.)

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Krishna[1]. The permission given to Sakubai by Raghu was a prohibition to Saibai.

Chintaman A. Rele for the respondents (defendants):—Raghu's estate has vested in his widow Saibai (defendant No. 2). The plaintiff's adoption would divest it. That being so, her consent to his adoption was necessary—*Bhoobun Moyee* v. *Ram Kishore*[2]; *Shri Dharnidhar* v. *Chinto*[3]; *Vasudeo* v. *Ramchandra*[4]; Mayne's Hindu Law (5th Ed), 209, 210. The letter (Exhibit 72), which is relied on as showing Raghu's permission to adopt, is not a testamentary writing, and merely shows his intention at the time to adopt. But that intention died with him. The letter cannot be construed as a direction to adopt after his death.

The son who is adopted must be younger than the mother—West and Buhler, 1055; Mayne, p. 152, Mandlik, p. 473-4. He must be the reflection of a son.

RANADE, J.:—The facts of this case are somewhat peculiar. The appellant, original plaintiff, claims to have been taken in adoption by one Sakubai, the widow of the predeceased son of Raghu Kulkarni, and brought the original suit for a declaration of his right to succeed as sole heir, and to recover possession of the property of Raghu against his natural brother, respondent No. 1, who claims to have been adopted as son to Raghu by his widow Saibai, respondent No. 2.

The undisputed and proved facts of the case are that Raghu died on 13th December, 1891. His son Baikrishna, who was Sakubai's husband, had died some thirteen years before. During his last sickness, Raghu expressed an intention that Sakubai should adopt a son, and invited her parents to come to his village, but by the time they arrived, Raghu became unconscious, and died on the same day, leaving Sakubai, his daughter-in-law, and Saibai, his widow, behind him. On the 3rd March, 1892, the adoption ceremony was performed, and appellant was given in adoption by his natural mother to Sakubai, and a deed of adoption was prepared and registered on 7th March, 1892. Both the

(1) (1885) 10 Bom., 80.
(2) (1865) 10 Moo. I. A., 279.
(3) (1895) 20 Bom., 250
(4) (1896) 22 Bom., 561.

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Courts below have found that Sakubai had Raghu's permission to adopt, and that Saibai was not present at, and did not give her consent to, the adoption of the appellant by Sakubai. They also find that Sakubai was younger in age than the appellant.

The Court of first instance found that Raghu had given permission to Sakubai to adopt appellant, and that this authority held good after his death, and that respondent No. 2 had no such permission, and could not, therefore, validly adopt respondent No. 1 as son to Raghu, and that appellant's adoption by Sakubai according to Raghu's direction had divested respondent No. 2 of the estate vested in her after Raghu's death. The lower appellate Court, however, held that the permission of Raghu was general, and not particular in respect of appellant's adoption by Sakubai; that the intention of Raghu died with him, and that the estate of Raghu vested in respondent No. 2, and Sakubai's adoption of the appellant did not divest respondent No. 2 of her rights as sole heir, as respondent No. 2 did not assent to the adoption. Finally, it held that the appellant's adoption was invalid because of this want of Saibai's consent, and the fact that Sakubai was younger in years than the appellant. The lower Court of appeal accordingly reversed the decree of the Court of first instance: and the appellant contends in second appeal that the lower appellate Court was in error in disallowing the adoption on the ground of the want of consent of respondent No. 2, and appellant's being older than his adoptive mother Sakubai. These were the only two points argued before us.

As regards the want of consent, it is to be noted that appellant in his plaint rested his case strongly on the allegation that respondent No. 2 had given her consent to Sakubai's adoption of the appellant. As a matter of fact, however, both Courts have found that respondent No. 2 did not give such consent. The contention now raised before us is that such consent was immaterial, as Raghu's permission was operative as a sanction to the adoption, whether his widow, respondent No. 2, was or was not a consenting party. Independently of this permission, it is admitted that, as between the daughter-in-law, widow of the predeceased son of Raghu, and the mother-in-law, widow of Raghu himself, the right of the latter was every way superior.

The estate vested in her as heir, and unless she chose to divest herself of this right, no act of the daughter-in-law could divest respondent No. 2 of her rights as sole heir of Raghu. Sakubai's husband Balkrishna was living in union with his father Raghu at the time of his death, and his widow Sakubai had no independent right to adopt without the sanction of her father-in-law.

This point may be regarded as settled by a long course of authorities. It is only necessary to refer to *Shri Dharnidhar* v. *Chinto*[1], where, as in this case, the plaintiff was adopted by the widow of a predeceased son, and the claim was resisted by her brother-in-law who had succeeded as heir. The Full Bench decision in *Vasudeo* v. *Ramchandra*[2] also related to a case of adoption by the widow of a predeceased son, and it was held there that such adoption did not divest the daughters, who had succeeded as heirs to their father, of their inheritance even when there was reason to think that one, if not both the daughters, had assented to the adoption. The authority of the decision in *Babu* v. *Ratnoji*[3] has been questioned by the Chief Justice in the Full Bench case noted above, on another point, but it well illustrates the principle of law that nothing but the consent of the person in whom the estate has vested by inheritance can divest him of the same by reason of any such adoption by the daughter-in-law. See also *Gayabai* v. *Shridharacharya*[4] and *Chandra* v. *Gajarabai*[5], where all previous authorities are reviewed at great length.

The case of a younger co-widow is an exception to this rule, for the elder widow may by subsequent adoption divest such younger widow of her rights in the estate. The case of *Vithoba* v. *Bapu*[6] also may be referred to as an exception. There the claim of a person adopted by the widow of a predeceased son, when the adoption was authorized by her father-in-law who was head of the family and guardian of the widow, was allowed to prevail against the rights of the widow's brother-in-law. Apart from these special exceptions, the general proposition, as stated above, holds good in all cases.

(1) (1895) 20 Bom., 250.
(2) (1896) 22 Bom., 551.
(3) (1895) 21 Bom., 319.
(4) P. J., 1881, p. 145.
(5) (1890) 14 Bom., 463.
(6) (1890) 15 Bom., 110.

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The next question for consideration is whether there was the father-in-law's authority in the present case which brought it within the exception, and took it out of the rule. The lower appellate Court has found, as a fact, that there was no such authority which survived after Raghu's death. Raghu indeed during his life-time expressed a wish to allow Sakubai to adopt a son, but nothing was done to give effect to this wish. The letter (Exhibit 78) confers no authority or power. It is a mere expression of a casual wish contained in a note of invitation sent to Sakubai's father to come to Raghu's place. There was no particular reason why the presence of Sakubai's parents was necessary. Raghu could have easily himself carried out the adoption as he desired, more especially as his wife was with him for several days before his death. He made no will, and gave no power to Sakubai. He gave no directions to his widow (respondent No. 2) not to adopt, and, unless prohibited expressly or by implication, a widow in this Presidency has an implied authority to adopt. This cannot be said of the daughter-in-law, who is the widow of a predeceased son. She must be specially authorized by the father-in-law to make a valid adoption binding against the heirs of her father-in-law. As respondent No. 2 did not give her consent to the adoption of the appellant by Sakubai, the adoption did not divest her of her exclusive right to succeed as heir to Raghu.

It is not strictly necessary to discuss the validity of the other objection arising out of the difference of age between his adopting mother and the appellant. But it may be as well to notice the point briefly. Appellant was about 32 years old when he was examined and Sakubai was 2 or 3 years younger. The lower Court of appeal has relied on Mayne, para. 130, and West and Buhler, p. 1055. The original authorities referred to by these text-writers are the same, being collected from Steele's Hindu Law and Customs, and the opinions of shástris. As regards the earlier Smriti texts, there seems to be no definite rule laid down on the point. The inference in favour of the adopted son being younger than his adoptive father, is extended to the mother by a somewhat loose analogy and interpretation of the text that the adopted son should be the reflection of a legitimate son. But in a system of law where bachelors and

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widowers are permitted to adopt, and where minors also can adopt, if they have arrived at the age of discretion, and where further married men with children have been held to be fit subjects for adoption, these strict interpretations of the old texts seem to be not a little out of place—*N. Chandvasekharudu* v. *N. Bramhanna*(1); *Nagappa* v. *Subba*(2); *Jumoona* v. *Bamasoonderai*(3); *Rajendro Narain* v. *Sroda Soondaree Dabee*(4); *Dharma* v. *Ramkrishna*(5); *Nathaji* v. *Hari*(6); *Lakshmappa* v. *Ramara*(7); *Mhalsabai* v. *Vithoba*(8); *Rangubai* v. *Bhagirthibai*(9). If a male person at any time of life may adopt a man of any age, and such male person is also permitted to marry a female minor of any age, it is obvious that the rule prescribing a difference of age in favour of the adopting mother must be only regarded as a directory rule, and not a command, the infraction of which invalidates the adoption. As observed above, it is not necessary to decide this point in the present appeal. As the adoption of appellant was made by Sakubai without proper authority, and without respondent No. 2's consent, it is inoperative and invalid for the purposes of the present claim. We would, therefore, reject the appeal, and confirm the decree with costs.

Decree confirmed.

(1) (1869) 4 Mad. H. C. Rep., 270.
(2) (1865) 2 Mad. H. C. Rep., 357.
(3) (1876) 3 I. A., 72.
(4) (1871) 15 Cal. W. R., 548.
(5) (1885) 10 Bom., 80.
(6) (1871) 8 Bom. H. C. Rep., 67.
(7) (1875) 12 Bom. H. C. Rep., 364.
(8) (1862) 7 Bom. H. C. Rep., Appx., 26.
(9) (1877) 2 Bom., 377.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

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April 12.

AMBABAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* GOVIND AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Jains—Gujarâti Jains settled in Belgaum—Succession among Jains—Rights of illegitimate sons of a Jain—Division into four castes—Inheritance—Illegitimate sons—Ordinary Hindu law, that of Brâhmins, Kshatriyas and Vaishyas—Jains mostly Vaishyas—Four divisions of Jains—Dassa Porwad caste of Jains.

The Courts in India have always recognized the existance of four castes, *viz*, Bráhmins, Kshatriyas, Vaishyas and Shudras.

* Second Appeal, No. 1235 of 1879.

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Jains are dissenters and are mostly of Vaishya origin. A Jain converted into orthodox Hindu faith returns to the caste from which he traces his first descent.

The four main divisions of Jains are Praman, Oswal, Agarwal and Khandewal

Unless a special custom to the contrary be established, the ordinary Hindu law governs succession among the Jains. Ordinary Hindu law is that of the three superior castes.

Under the ordinary Hindu law, illegitimate sons do not inherit, but are only entitled to maintenance.

Held, that a Jain of the Dassa Porwad caste was governed by the general Hindu law applicable to the three regenerate castes, being, though not a Brâhmin, certainly not a Shudra, but a Vaishya by origin, and having as such carried this law with him from Gujarát to the Belgaum District.

Held, therefore, that his widow was his sole heir, and that his illegitimate sons were only entitled to maintenance.

Quære—Whether even among Shudras the widow is altogether excluded from inheritance by illegitimate sons?

Rahi v. *Govinda*[1] doubted.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum.

One Bapuchand was a Gujar trader of the Dassa Porwad caste settled in the Belgaum District. This caste is one of the four main divisions of the Jain community of Gujarát, who are mostly of Vaishya origin.

After Bapuchand's death his widow, Ambabai, as his heir brought this suit against the defendants to recover Rs. 1,600, together with interest, which she alleged had been lent to them by the deceased.

Defendants denied the alleged loan, and alleged that Bapuchand was a Shudra by caste, and that they were his illegitimate sons by his concubine, and that as such they were his heirs in preference to his widow (the plaintiff).

The Court of first instance, without deciding whether the plaintiff or defendants were the heirs of the deceased Bapuchand, held that the alleged loan was a provision made by the deceased for the maintenance of the defendants, and dismissed the suit.

On appeal, the District Judge remanded the case to the first Court for a finding as to whether the plaintiff or defendants were the heirs of Bapuchand.

(1) (1875) 1 Bom., 97.

The first Court found that defendant No. 2 was an illegitimate son of Bapuchand by his concubine Jamna; and that as Bapuchand was a Vaishya belonging to one of the regenerate classes, his widow and not defendant No. 2 was his heir.

On appeal the District Judge held that Bapuchand was a Shudra and that, therefore, defendant No. 2 as his illegitimate son was his heir and not the plaintiff. The plaintiff's claim was, therefore, rejected.

His reasons were as follows:--

"There can, I think, be no reasonable doubt that Bapuchand regarded the two defendants as his sons (by his concubine Jamna), and that the second certainly was so.

"Now as Bapuchand was certainly a Shudra, no pretence being made that he was a Brâhmin, it follows that his illegitimate sons or son are or is his heir. In this Kaliyug there are according to the authorities only two classes among the Hindus, the regenerate Brahmanas and unregenerate Shudras—West and Buhler, p. 1135. Pure Kshatriyas and Vaishyas are not now recognized—Steele, 89, 90. On this broad ground alone, then, the case would be concluded against the plaintiffs. It has been pleaded that Bapuchand was a Dassa Porwad Wânia of Gujarât. And it has been argued that these are not Shudras. Now the brother in law of the deceased Bapuchand distinctly says and repeats that he is a Shudra, and if he is a Shudra, Bapuchand must have been a Shudra also. This is the best possible evidence, and I cannot agree with the learned Judge below in brushing it aside with the remark that 'it must have been a mistake.' It is incredible that any man who was not in fact a Shudra should have deliberately described himself as such twice over. On the other hand, it is natural enough that men who are really Shudras should affirm that they belong to a higher class, and that consideration disposes of the evidence of Bapuchand's so-called caste-fellows. It was further argued that among the Dassa Porwad Banias, *pat* marriage was forbidden, and illegitimate sons did not succeed as heirs. Some evidence was taken on commission to prove that point. But it is insufficient. No instances are given, and that kind of proof which is required to establish a special custom according to all the authorities is not to be found here. The suit is brought by the widow of Bapuchand to recover a debt due to the estate. The second plaintiff is the brother of the first and not an heir. Obviously, then, if neither plaintiff is an heir, the suit fails. Holding that defendant No. 2 is the heir, the necessary result is that this suit must be dismissed."

Against this decision plaintiffs preferred a second appeal to the High Court.

Branson (with him *B. A. Bhagvat* and *S. R. Bakhle*) for appellants:—The question is, who is the heir of the deceased Bapuchand.

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—his widow or the defendants who claim to be his illegitimate sons by a concubine? The lower Court holds that the deceased was a Shudra, but the reasons given for this finding are very curious. In the opinion of the lower Court, there are only two castes among Hindus- Bráhmins and Shudras: he who is not a Bráhmin is a Shudra. There is no authority for such an opinion. On the contrary the Courts have always recognized four main divisions or castes among Hindus, of which Bráhmins, Kshatriyas and Vaishyas constitute the three superior or regenerate classes. See *Rahi* v. *Govinda*(1); *Chuotoorya Run Murdan Syn* v. *Sahib Purhulad*(2). Now the deceased was a Jain of the Dassa Porwad caste. Jains are generally Vaishyas by origin and not Shudras; and though they are dissenters from the orthodox Hindu religion, they are governed by the ordinary Hindu law in matters of inheritance and succession—*Bhagvandas* v. *Rajmal*(3), *Rukhab* v. *Chunilal Ambushet*(4); *Chotay Lall* v. *Chunno Lall*(5), *Amara* v. *Mahadgauda*(6). That being the case, the defendants, as illegitimate sons of the deceased, are only entitled to maintenance, but do not inherit—*Rahi* v. *Govinda*(1). The plaintiff, who is the widow of Bapuchand, is, therefore, his heir.

M. V. Bhat for respondents —It is found as a fact that the deceased was a Shudra. It is admitted by plaintiffs' brother that he was a Shudra, and there is no evidence to the contrary. This finding is, therefore, conclusive in second appeal. If so, the illegitimate sons inherit in the absence of legitimate sons, daughters or daughters' sons—*Rahi* v. *Govinda*(1); *Sadu* v. *Baiza*(7). Defendants are, therefore, Bapuchand's heirs to the exclusion of his widow, and her suit was rightly dismissed.

RANADE, J.:—In this case, the appellant No. 1 is the widow of deceased Bapuchand, and she and her brother, appellant No. 2, who manages her affairs, brought the original suit on a book entry for 1,600 rupees signed by respondent No. 1 on 28th September, 1892, in the accounts of deceased Bapuchand. Re-

(1) (1875) 1 Bom., 97.
(2) (1857) 7 Moore I. A., 18.
(3) (1873) 10 Bom. H. C. Rep., 211.
(4) (1891) 16 Bom., 317.
(5) (1878) 6 I. A., 15.
(6) (1896) 22 Bom., 416.
(7) (1878) 1 Bom., 37.

spondent No. 1 was described in the plaint as the son of one Jamna, and his brother, respondent No. 2, was similarly described, and joined as co-defendant as living with respondent No. 1.

Both respondents denied appellant-plaintiff's right to sue, and claimed themselves to be the heirs of Bapuchand, as their mother Jamna was in Bapuchand's keeping and they were Bapuchand's illegitimate sons. They also denied that the sum of 1,600 rupees was advanced as a loan, and contended that it was a provision made by Bapuchand for their maintenance, and that the book entry was made by respondent No. 1 to protect himself from his creditors.

The Court of first instance did not at first decide the question of heirship, but dismissed the claim after finding that the book entry related to a sum which was advanced by deceased Bapuchand, not as a loan, but as a provision for the maintenance of the respondents. The District Judge, in appeal, sent down the case for a definite finding on the question of heirship, and thereupon the Court of first instance found that, as Bapuchand was of the Dassa Porwad caste, he was a Vaishya, or a member of the first three regenerate castes, and that of the two respondents, respondent No. 1 was not Bapu's son, and that respondent No. 2 was his illegitimate son but not his heir, as Bapuchand was not a Shudra. When the District Judge finally dealt with the case, he held that Bapuchand was a Shudra by caste, and that his illegitimate son, respondent No. 2, if not respondent No. 1 also, was his son and heir, and not his widow, appellant No. 1. The District Judge recorded no finding on the third issue about consideration, but expressed an opinion that, if appellant No. 1 were Bapuchand's heir, the suit in its present form would lie.

The principal point argued in second appeal relates to the question of the caste status of the deceased Bapuchand. He was admittedly a Gujaráti Jain trader of the Dassa Porwad caste settled in the Belgaum District. The chain of reasoning which led the District Judge to reverse the finding of the Court of first instance on this point appears to be based on the assumptions that there are at present only two castes, the regenerate Bráhmins and the unregenerate Shudras: pure Kshatriyas and pure Vaishyas

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are not now recognized. If, therefore, Bapuchand was not a Bráhmin, he must be regarded as a Shudra. The District Judge was also led to think that the Dassa Porwad caste to which Bapuchand belonged was a Shudra caste, chiefly because Bapuchand's brother-in-law admitted that he was a Shudra, and that the evidence of a caste custom, modifying the general rule about the succession of illegitimate sons of Shudras, was not sufficient to prove such a custom.

It appears to us that the District Judge was in error in the cardinal assumption that there are now only two principal castes, and that if a man is not shown to be a Brahmin, he must belong to the Shudra class, as pure Kshatriyas and pure Vaishyas are not now recognized. The authorities cited in support of this view, (West and Bühler, p. 1135, and Steele, pages 89, 90) are clearly insufficient to prove any such position. Both these compilers do not state any such conclusion as their own, but only represent the opinion which Bráhmin shástris and pandits hold on the point. These latter opinions have no juridical value. As will be seen from a study of the original texts, they assume all through that there are representatives of the Kshatriya and Vaishya castes all over the country.

In both these works, elaborate lists of numerous castes are given which claim to be Kshatriyas or Vaishyas. The Kayasthas are mentioned in Steele as claiming to be Kshatriyas. The Maratha families of the Bhosles of Sátára and Kolhápur, and the Pátankars, Ghorpádes, Ghatges and Shirkes are mentioned as claiming to be Kshatriyas. Steele mentions that there are pure Vaishyas in Southern India. The Courts in India have always recognized the fourfold division. In *Rahi* v. *Govinda* [1] the three regenerate castes are specially mentioned as being distinguished from the fourth Shudra caste in respect of the rights of illegitimate sons. In his judgment in this case, Westropp, C. J., tried to explain a certain position of Lord Cairns in *Indeun Valungypooly* v. *Ramasawmy* [2] by the supposition that Padmanabha, whose property was in dispute, was not a Shudra, but a Kshatriya. In an early case relating to the Lingáyats, the marginal note describes the parties as belonging to the Vaishya

(1) (1875) 1 Bom., 97. (2) (1869) 13 M. I. A., p. 141.

caste. The leading case, however, on this part of the subject is that of *Ohuoturya Run Murdun Syn* v. *Sahib Pursulad Syn* (1), where the opinion of the pandits, that Kshatriyas and Vaishyas have become extinct as castes, was discussed and negatived, and the existence of Rajputs as Kshatriyas was affirmed in the most positive manner. This ruling is of special importance, for the dispute in that case related to the claims of illegitimate sons. All these authorities make it perfectly clear that there is no foundation for the supposition that there are now only two principal caste divisions. The Kshatriyas were, according to this view of the pandits, exterminated by Parshuram, and yet in the two next incarnations of Rama and Krishna we have the solar and lunar races again in the ascendant, and the present Rájputána chiefs claim descent from them. There is no such mythical explanation even suggested for the extinction of the Vaishyas. We cannot, therefore, accept the correctness of this myth; and it must be discarded in a judicial settlement of questions relating to caste and status.

In the present case there is a further reason for setting aside such mythical considerations. Bapuchand was a Gujar trader of the Dassa Porwad caste, which caste is a sub-division of the Gujaráti Jains. The Jains are dissenters, and purely orthodox traditions about caste status can have no place when they are applied to Jains. Though settled in Belgaum, it is obvious that Bapuchand carried his personal law with him from Gujarát. The Márwádi Jains, who were parties to the case of *Bhagvandas* v. *Rajmal* (2), were similarly held to carry their own personal law with them to Ahmednagar. A series of decisions commencing with the case noted above, and coming down to the present day, have made it clear that this personal law of the Jains is the ordinary Hindu law of the place where they are settled—*Rukhab* v. *Chunilal* (3), *Amara* v. *Mohadgauda* (4); *Dalip* v. *Ganpat* (5), *Lalla Mohabeer Pershad* v. *Mussamut Kundun Koovar* (6), *Chotay Lall* v. *Channo Lall* (7); *Manik Chand* v.

(1) (1857) 7 M. I. A., 18.
(2) (1873) 10 Bom. H. C. Rep., 241.
(3) (1891) 16 Bom., 347.
(4) (1893) 22 Bom., 116.
(5) (1886) 8 All., 387.
(6) (1867) 8 Cal. W. R., 116.
(7) (1878) 6 I. A., 1.

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as they all belonged originally to the Vaishya caste, the Porwads must be similarly treated. The District Judge has laid too much stress on a statement of witness, Exhibit 52, who is brother of appellant No. 1. He appears to have stated that he was a Jain *Shudra*. This admission must be set down to inadvertence or ignorance. The evidence of the Dassa Porwad witnesses examined in the case, Exhibits 85, 86, 87, 88, and two examined on commission, was too summarily disposed of as being self-interested evidence. On the whole, it is quite clear, from the authorities stated above, that Bapuchand, as being a Jain of the Dassa Porwad caste, was governed by the general Hindu law applicable to the three regenerate castes, being though not Bráhmin, certainly not a Shudra, but a Vaishya by origin, and as such he carried this law with him from Gujarát to the Belgaum District.

Lastly, it may be noted that even if the view that Bapuchand was a Shudra be accepted, it does not follow that his illegitimate sons would take the whole estate to the exclusion of the widow. Illegitimate sons of Shudras are, no doubt, their heirs, taking with legitimate sons, daughters and daughters' sons only half the share of the legitimate son. The ruling in *Rahi* v. *Govinda* (1) no doubt laid it down that widows are absolutely excluded where there are only illegitimate sons, as they would be in the case of legitimate sons. But the ruling, though supported by West and Bühler, has been strongly dissented from by the Madras High Court—*Parvathi* v. *Thirumalai* (2); *Ranoji* v. *Kandoji* (3); and Mr. Mayne also has spoken doubtfully on the point of its correctness. In *Shesgiri* v. *Girewa* (4), Sargent, C. J., apparently thought that the widow would not be altogether excluded by illegitimate sons. It is, however, not necessary to decide the point, as we feel satisfied that in this particular case the appellant-widow alone was sole heir, and the respondents as illegitimate sons were only entitled to maintenance. It follows that the District Judge must be asked to find on the contentio about the true nature of the transaction, and the liabili[ty] f the

(1) (1875) 1 Bom., 97.
(2) (1886) 10 Mad., 334.
(3) (1884) 8 Mad., 557.
(4) (1889) 14 Bom., 232.

1898.

AMBABAI v. GOVIND.

Jagat Settani Pran Kumari Bibi(1). The Jains have caste divisions of their own, which exist in full force in Eastern and Southern India. A Jain converted into the orthodox Hindu faith returns back to the caste from which he traces his first descent. These extracts are taken from the judgment of Westropp, C. J., who quotes from Elphinstone, Erskine, Colebrooke, Mackenzie and Wilson. These writers state definitely that the Jains are mostly of Vaishya origin, and they employ Bráhmins in their temples and at their marriages, along with their yatis.

On the authority of these opinions, the Courts have invariably held that, unless a special custom to the contrary be established, the ordinary Hindu law governs succession disputes among the Jains—*Lalla Mohabeer Pershad* v. *Mussamut Kundun Koovar* (2). The word "ordinary" here indicates the general or normal Hindu law, the law of the three regenerate castes. As the Jains are mostly Vaishyas, it is plain that the exceptional rules laid down for Shudras can have no place in matters relating to Jains. The ordinary Hindu law being that of the three superior castes, to the third of which division the Jains mostly belong, under that law illegitimate sons do not inherit, but are only entitled to maintenance—*Rahi* v. *Govinda*(3); *Narayan* v. *Laving*(4); *Chuoturya Ran Murdun Syn* v. *Sahib Purhulad Syn*(5); *Narain Dhara* v. *Rakhal Gain*(6); *Sadu* v. *Baiza*(7); *Jogendro Bhupati* v. *Nittyanund*(8); *Viraramuthi Udayan* v. *Singaravelu*(9). The last of these cases related to parties who were Jains of the Southern Marátha Country.

The Porwad caste of Gujaráti Jains finds a place in Mr. Borradaile's Collection of Gujaráti Caste Customs. The word "Porwad" is apparently a corruption of Pramar, being one of the four main divisions of the Jain community. The other three divisions are Oswal, Agarwal and Khandewal. There are express decisions as regards the Oswal and Agarwal divisions, and

(1) (1889) 17 Cal., 518.
(2) (1857) 8 Cal. W. R., 116.
(3) (1865) 1 Bom., 97.
(4) (1877) 2 Bom., 140.
(5) (1857) 7 M. I. A., 18.
(6) (1875) 1 Cal., 1.
(7) (1878) 4 Bom., 37.
(8) (1885) 11 Cal., 702.
(9) (1877) 1 Mad., 306.

as they all belonged originally to the Vaishya caste, the Porwads must be similarly treated. The District Judge has laid too much stress on a statement of witness, Exhibit 52, who is brother of appellant No. 1. He appears to have stated that he was a Jain *Shudra*. This admission must be set down to inadvertence or ignorance. The evidence of the Dassa Porwad witnesses examined in the case, Exhibits 85, 86, 87, 88, and two examined on commission, was too summarily disposed of as being self-interested evidence. On the whole, it is quite clear, from the authorities stated above, that Bapuchand, as being a Jain of the Dassa Porwad caste, was governed by the general Hindu law applicable to the three regenerate castes, being though not Bráhmin, certainly not a Shudra, but a Vaishya by origin, and as such he carried this law with him from Gujarát to the Belgaum District.

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(1) (1875) 1 Bom., 97.
(2) (1886) 10 Mad., 334.
(3) (1884) 8 Mad., 537.
(4) (1889) 14 Bom., 232.

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defendants, or either of them, in respect of the same. We ask the District Judge to record findings on these issues :—

1. Whether the book entry represented a loan or a provision for maintenance ?

2. Whether the defendants, or either of them, are liable, and if so, for what amount ?

He should certify his findings on these points within two months.

Issues sent down.

ORIGINAL CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Strachey.

1898. *March* 25.

RAGHUNATH MUKUND (PLAINTIFF) *v.* SAROSH K. R. KAMA AND OTHERS (DEFENDANTS).*

Civil Procedure Code (Act XIV of 1882), *Secs.* 278-283—*Attachment of same property in execution of decrees obtained by different creditors—Claim made in one suit to attached property under section* 278—*Order made under section* 281—*Suit by claimant to establish right—All attaching creditors made defendants to suit—Parties—Practice—Civil Procedure Code (Act XIV of* 1882), *Sec.* 28—*Small Cause Court—Jurisdiction—Declaratory decree.*

The first and second defendants obtained a decree in Suit No. 1548 of 1897 against Runchordas, described as the owner of the Wahalan Mills, and attached property on the mill premises. Twelve other creditors also brought twelve other similar suits and obtained decrees against other persons who were also described as owners of the Wahalan Mills, and attached the same property. In Suit No. 1548 of 1897, Raghunath Mukund (the present plaintiff) under section 278 of the Civil Procedure Code (Act XIV of 1882) claimed the property. His claim was disallowed, and he was ordered to bring a suit under section 283. No claim or order was made in the case of the other twelve suits. Raghunath now sued, in pursuance of the above order, to recover his property, and he included as defendants not merely those (defendants Nos. 1 and 2) who had been plaintiffs in Suit No. 1548 of 1897, but also those who had been plaintiffs in the twelve other suits, and who had attached the property in execution of their decrees. It was objected that no suit would lie against the latter, as in their suits no claim had been made to the goods which they had attached and no order made under section 281 of the Civil Procedure Code (Act XIV of 1882).

* Small Cause Court Reference, No. 9585 of 1897.

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RAGHUNATH MUKUND v. SAROSH K. R. KAMA.

Held (1) that the suit lay against the defendants (other than Nos 1 and 2), although no claim had been made or order passed under section 281 of the Civil Procedure Code. The summary remedy given by section 278 of the Civil Procedure Code (Act XIV of 1882) is alternative to the remedy by way of suit. The object of section 278 is not to deprive a claimant of his remedy by suit, but to give him, if he is diligent, a more speedy and summary remedy

(2) That the Court of Small Causes had jurisdiction to try the suit In substance the suit was a suit for goods, though as a matter of form the decree might contain a declaration. A suit for the release of goods wrongfully seized is not a declaratory suit under section 12 of the Specific Relief Act (I of 1877).

(3) That although the value of the property claimed by the plaintiff was admittedly over Rs 2,000, the Court of Small Causes had jurisdiction. The plaintiff was entitled to abandon part of his claim.

(4) That the plaintiff might join in one suit as defendants persons who had decrees against different persons. The right to relief was in respect of the same matter and, therefore, fulfilled the requirements of section 28 of the Civil Procedure Code, 1882.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV of 1882) by C. W. Chitty, Chief Judge:—

"1. This is a suit brought by the plaintiff to recover from the defendants a sum of Rs. 2,000, being a portion of a larger sum of Rs. 3,000, the value of certain goods mentioned in the schedule annexed to the plaint, which goods were attached by the defendants in execution of certain decrees of this Court. The plaintiff in the alternative seeks to recover the said sum of Rs 2,000 for damages sustained by the plaintiff by reason of the defendants' wrongful acts in attaching or causing to be attached and sold in execution of their decrees the goods which belonged to the plaintiff and in which their judgment-debtors had not any right, title or interest, or for money had and received for plaintiff's use.

"2 The facts which it is necessary to state for the purposes of this reference are as follows

"There is, in Bombay, a mill known as the Wahalan Mill, and the business of the mill is, or was, carried on in the name of the Wahalan Spinning and Weaving Company. The proprietorship of the mill and the business is in dispute, and it is a question which will doubtless have to be determined by the Courts sooner

1898.

RAGHUNATH MUKUND v. SAROSH K. B. KAMA

or later, if not in this suit. It is sufficient now to say that the business of the mill ended in a loss, and the proprietor or proprietors became heavily involved, and eventually the mill had to cease working. The creditors then proceeded to file suits. The first suit filed in this Court was Suit No. 1548 of 1897, in which the first and second defendants were plaintiffs and one Runchordas Gocouldas, described as 'proprietor of the Wahalan Spinning and Weaving Company', was defendant. Twelve more suits were filed, in which the defendants in this suit (other than defendants Nos. 1 and 2) were the several plaintiffs and one Lakshmishankar Pranshankar was defendant. A fourteenth suit was filed by another creditor (not a defendant in this suit) in which Lakshmishankar Pranshankar, his two brothers Shivshankar Pranshankar and Nathushankar Pranshankar, and Raghunath Mukund (the present plaintiff) were all joined as parties defendants. I believe that other suits have been filed subsequently, but they are not in question here.

"3. In all the suits above mentioned, decrees were passed and all the judgment-creditors levied attachments on the moveable property lying on the mill premises, consisting of machinery, mill stores and the like. In Suit No. 1548 of 1897 the present plaintiff and Lakshmishankar Pranshankar preferred a claim to the attached property, alleging (as the plaintiff now alleges) that the plaintiff was the real owner of the Wahalan Mill, and that the property attached was his property. The claimant notice came on before me for hearing on the 1st July, 1897. It then appeared that Lakshmishankar Pranshankar, who was absent, was not properly represented. It was also conceded on all sides that the question of the ownership of the attached property was too intricate to be satisfactorily decided on a claimant notice. I, therefore, formally disallowed the claim and relegated the plaintiff to a substantive suit under section 283 of the Civil Procedure Code (Act XIV of 1882) to be filed within six months.

"4. The plaintiff accordingly on the 13th August, 1897, filed the present suit and joined as defendants not only the plaintiffs in Suit No. 1548 of 1897 in which the claim was preferred, but also the plaintiffs in the twelve suits above mentioned in which Lakshmishankar Pranshankar was the sole defendant. In those

twelve suits no claim was preferred, or objection made, to the several attachments.

"The suit came on before me for hearing on the 17th November, 1897. The main issue raised by all the defendants was whether the goods in question were, in fact, the goods of the plaintiff, but besides that issue there were several preliminary issues on which the opinion of their Lordships is now solicited."

The following were the preliminary issues :—

1. Whether this suit will lie against the defendants (other than defendants Nos. 1 and 2), no claim having been preferred, or objection made, in their suits under section 278 of the Civil Procedure Code, and no order having been passed under section 281 ?

2. Whether this Court has jurisdiction to try this suit, it being, in effect, a suit for a declaratory decree ?

3. Whether this Court has jurisdiction, because the value of the property claimed by the plaintiff as his own is admittedly over Rs. 2,000, and plaintiff cannot, as he purports to do, abandon the excess ?

4. Whether the plaintiff can join in one suit, as parties-defendants, plaintiffs who have decrees against different persons ?

Raikes, for plaintiff.

Vicaji, for defendants Nos. 1 and 2.

The following authorities were cited :—*Sundar Singh* v. *Ghasi*(1); *Varajlal* v. *Kachia*(2); *Lalchand* v. *Sakharam*(3); *Venkapa* v. *Chenbasapa*(4); *Krishnaji* v. *Bhaskar*(5); *Nito Kalee* v. *Kripanath*(6); *Deen Dyal* v. *Puran Dass*(7); *Chandra Bhusan* v. *Ram Kanth*(8); article 11 of Schedule II of Limitation Act (XV of 1877); sections 19 and 20 of Act XV of 1882 (Presidency Small Cause Courts Act); *Colvin* v. *Mrs. Barbara Owen*(9); *Nathu* v. *Kalidas*(10);

(1) (1896) 18 All., 410.
(2) (1896) 22 Bom., 473.
(3) (1868) 5 Bom. H. C. Rep., 139 (A. C.) at p. 143.
(4) (1879) 4 Bom., 21.
(5) (1880) 4 Bom., 611.
(6) (1867) 8 Cal. W. R., 353.
(7) (1868) 9 Cal. W. R., 474.
(8) (1885) 12 Cal., 108.
(9) (1869) 2 Beng. L. R., 212.
(10) (1877) 2 Bom., 365.

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Gordhan v. *Kasandas*[1], *Chhaganlal* v. *Jeshan Rav*[2]; *Pagi Partap* v. *Vanajlal*[3]; *Khursedji* v. *Pestonji*[4].

FARRAN, C. J.:—We answer the first question in the affirmative, being of opinion that the suit will lie against the defendants (other than defendants Nos. 1 and 2), though no claim has been preferred or objection made in their suits under section 278 of the Civil Procedure Code, and no order passed under section 281. The summary remedy given by section 278 of the Civil Procedure Code to a person whose property has been wrongfully attached, appears to us to be alternative with the more elaborate one by way of suit, which he, if so minded, may adopt. The context of the section shows, we think, that this is so. If the claimant desires to adopt the summary remedy he must do so without delay. No period within which he must make his claim under section 278 is specified, but if he unduly delays to make it, the section enacts that he shall be relegated to a suit. The object of the section is not, therefore, to deprive a claimant of his remedy by suit, but to give him, if he is diligent, a more speedy and summary remedy. The case cited by the Chief Judge, *Man Kuar* v. *Tara Singh*[5], has been dissented from in *Sundar Singh* v. *Ghasi*[6] and, we think, rightly so. Our view of the law is in accordance with *Lalchand* v. *Sakharam*[7], and *Chandra Bhusan* v. *Ram Kanth*[8]. The *cursus curiæ* has, we believe, as observed in *Sundar Singh* v. *Ghasi*[9], run in this direction for many years in all the High Courts.

The second question must also, we think, be answered in the affirmative. The direct object of a claimant whose goods have been seized by the Sheriff is to get his goods released from attachment, and not merely to have it declared that they are his goods. In substance the suit is a suit for the goods, though as a matter of form the decree may contain a declaration. A declaratory suit properly so called is a suit of the nature described in section 42 of the Specific Relief Act. When a man's goods

(1) (1879) 3 Bom., 179.
(2) (1879) 4 Bom., 503.
(3) (1884) 8 Bom., 259.
(4) (1888) 12 Bom., 573.
(5) (1885) 7 All., 583.
(6) (1896) 18 All., 410.
(7) (1868) 5 Bom. H. C. Rep., 139 at p. 143.
(8) (1885) 12 Cal., 108.
(9) (1896) 18 All. at p. 412.

1898

RAGHUNATH MUKUND v. SAROSH K. R. KAMA.

are wrongfully seized, there is no discretion vested in the Court as to whether it will entertain a suit for their release or not. The plaintiff is entitled to have them released. It would be an error to call a suit intended to have such a result a suit for declaration.

As to the third question, we think the plaintiff was entitled to abandon part of his claim so as to bring the case within the limits of the Small Cause Court jurisdiction.

The fourth question must also be answered, we think, in the affirmative. The right to relief against all the attaching creditors is in respect of the same matter, and so the suit fulfills the requirements of section 28 of the Civil Procedure Code. Mr. Vicaji contends that as some of the claimants have attached the property as that of Runchordas Goculdas, while others have attached it as the property of Lakshmishankar Pranshankar, the provisions of section 28 do not cover the case, but that does not appear to us to vary the plaintiff's right of suit. Both sets of creditors have attached goods which the plaintiff claims as his. The plaintiff must establish his ownership as against both. The law does not compel him to establish it as against each attaching creditor, or against each set of attaching creditors. It would be very unfortunate, we think, if it did, though it might be an advantage to the legal profession.

The costs of the reference will be costs in the case.

Attorneys for plaintiff:—Messrs. *Nanu and Hormusji.*

PRIVY COUNCIL.

KARAMSI MADHOWJI (DEFENDANT), APPELLANT, *v.* KARSANDAS NATHA AND OTHERS (PLAINTIFFS), APPELLANTS.

P. C.*
1898.
June 28,
July 12.

On appeal from the High Court at Bombay.

Hindu law—Will—Construction—Gift conditional on adoption—Condition precedent—Direction to adopt given to the widow of the testator's deceased son, not carried out—Bequest of residuary property—Condition precedent not fulfilled

The will of a childless testator directed that the widow of his deceased son should adopt a boy, then aged nine years, who was the son of the testator's nephew. To this boy the testator bequeathed his residuary estate to be made

* Present: LORDS WATSON, HOBHOUSE, and DAVEY, and SIR R. COUCH.

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KARAMSI MADHOWJI v. KARSANDAS NATHA.

over to him at the age of twenty one years. The widow, having refused to adopt him, died while he was still a minor, without having done so.

During her life the question arose whether this bequest was to take effect only upon the condition that the adoption should have taken place, or was a legacy validly made in his favour, as a person designated, without the adoption having been carried out.

In 1887, before the death of the widow, a suit for the construction of the will was decided to the effect that the adoption was a condition precedent to the minor's taking the legacy. A review of that judgment was refused when, after coming of age in 1894, he applied for it. His application to be allowed to appeal from that judgment was, however, granted, the circumstances being deemed by the appellate Court to be sufficient cause for the delay, within section 5 of the Limitation Act (XV of 1877).

The appellate Court subsequently heard the appeal and affirmed the decision of the Division Court. On appeal to the Privy Council,

Held, affirming the decree of the High Court, that the adoption was a condition precedent and that the boy not having been adopted could not take under the will.

APPEAL from a decree (21st February, 1896) of the appellate High Court[1], affirming a decree (1st October, 1887) of the High Court in the original jurisdiction.

With the object of obtaining the true construction of certain of the provisions of the will of Kessowji Jadhowji, a Hindu resident in Bombay, who died on the 9th February, 1886, this suit was brought in 1887 by Karsandas Natha and others, executors. The testator's only son Liladhar had died before his father, leaving a widow Ladkavahu and an only child Kesserbai. The plaintiff Karsandas Natha, now first respondent, was nephew of the testator. The widow Ladkavahu was the first defendant, and with her was joined Karamsi Madhowji, then an infant, as co-defendant, through his father Madhowji Katchra, who was another nephew of the testator.

By the will, in the Gujaráti language, Ladkavahu was directed to adopt Karamsi, then nine years old. She, however, refused to adopt him, and she died in 1890 without having done so. The will also used words to the effect that so much of the estate as might remain, after all the things directed in the will had been done, should go to Karamsi as his inheritance.

(1) (1896) 20 Bom., 718.

Difference of opinion having arisen as to whether or not the adoption was a condition precedent to Karamsi's becoming entitled to the residuary estate, this suit was instituted in 1887 for the construction of the will.

On this appeal the question was, mainly, as to the true construction of the words used by the testator in reference to the residue,—whether the words referred to what it would consist of, or, having a wider effect, meant that the adoption must precede Karamsi's getting the residue.

The clauses in the will affecting this question appear in their Lordships' judgment.

The suit, *Karsandas Natha and others* v. *Ladkavahu and another* [1], was decided on the 1st October, 1887, in the original jurisdiction by Farran, J. The Court was of opinion that the testator's direction to his daughter-in-law to adopt was to adopt a son to her deceased husband and herself, that being the only lawful adoption to which she was competent; and that Karamsi, unless and until he should have been adopted, was not entitled under the will to the testator's property, his adoption being a condition precedent to the taking under the will, as the Court construed it. *Shamavahoo* v. *Dwarkadas Vasanji* [2] was cited. Karamsi, having come of age in 1894, filed a petition for review, stating that he had been a minor in 1887, and that the decree had not given him an opportunity to show cause against it, with reference to its effect upon his interests on his attaining full age. The judgment on that petition, dated 4th March, 1895, and rejecting it, is reported in *Cursandas Natha* v. *Ladkavahu* [3].

On the 8th March, 1895, Karamsi petitioned for an order calling on the plaintiffs to show cause why, as he had been a minor when the case had been decided by the original Court, and as circumstances had been such as to impede an appeal being preferred on his behalf, he should not be allowed to appeal after all. The High Court were of opinion that cause should be shown; and after hearing the plaintiffs, granted leave to appeal. Their judgment (Sir C. Sargent, C. J., and Bayley, J.) stated the

(1) (1887) 12 Bom., 185. (2) (1878) 12 Bom., 202.
(3) (1895) 19 Bom., 571.

1898.

KARAMSI MADHOWJI v. KARSANDAS NATHA.

grounds on which the special circumstances were considered by them to be sufficient excuse for the lapse of time that had taken place, within section 5 of the Limitation Act XV of 1877, regard being had to the fact that the interest of the minor to obtain reversal of the original decree had not been identical with those of his guardian—*Cursandas* v. *Ladkavahoo*[1].

The appeal having been heard, the High Court (Parsons and Strachey, JJ.) on the 21st February, 1896, confirmed the decree made by Farran, J., in the original Court on the 1st October, 1887. They said [2] that they agreed with the learned Judge that Karamsi, as he had not been adopted, was not entitled to the residue of the testator's property.

They quoted clause 28 of the will, and added :—

"That clearly means that he is first to be adopted,—adoption being one of the things mentioned in the will. The words 'as his inheritance' show that the residue is left to him because he is an heir. Clause 46 provides for the case of his dying after adoption. Nothing being left to him if not adopted, this was the only contingency to be provided for.

"The case of *Bireswar* v. *Aidha Chunder* [3] is quite different. There was clear indication there of the testator's intention before making an adoption, to give the property to the boy. Here there was no such intention. On the contrary it was clear that the intention was only to give it after the adoption had taken place. It was to the adopted boy, and not to the *persona designata*, Karamsi, that the bequest was made,—compare clause 46 of the present will with clause 11 of the will in that case, and the distinction pointed out by their Lordships of the Privy Council at p. 107 will at once appear. This case is on all fours with *Shamavahoo* v. *Dwarkadas Vasanji* [4], and the decision of the Judge following that case is correct. We, therefore, confirm the decree with costs."

On this appeal—

Cozens-Hardy, Q. C., and *Branson*, for the appellant, argued that the High Court were in error in holding that the appellant, in order to become entitled to the property bequeathed by the will, must have been adopted. The right construction was that he was entitled to the residue bequeathed to him independently of the adoption. The fact that there was no gift over, in the case of the appellant not being adopted, went far to show that the bequest to him was absolute, and not conditional upon his adoption by

(1) (1895) 20 Bom., 104.
(2) (1896) 20 Bom., at pp. 719-720.
(3) (1892) 19 Ind. Ap., 101.
(4) (1878) 12 Bom., 202.

Ladkavahu. They referred to *Bireswar Mukerji* v. *Ardha Chunder Roy*[1], where the bequest was by name to a boy whom the testator indicated as one whom he was about to adopt, but who was not adopted. As in that case, the appellant was not selected as being the adopted son, but for reasons independent of adoption, and, as in that case, the bequest was held good, so here Karamsi should be held entitled. In clause 28 of the will there was an absolute gift to him. He was a designated person, and it was not of the essence of the gift that he should have been adopted before it could take effect. The words of the will, throughout, were consistent with his taking the bequest; and, on the other hand, if he did not obtain it, there would be an intestacy as to part, a state of things contrary to the testator's intentions. And such a construction would be contrary to the presumption applicable to a will. Reference was made to section 71 of the Indian Succession Act, 1865, as to the construction of a sentence in a will susceptible of two meanings. That which would give effect was to be preferred to that which would not.

Haldane, Q. C., and *J. D. Mayne*, for the respondents:—The will taken as a whole made it clear that the capacity to take the residue depended on the legatee having the qualification of being the adopted son. Clause 29 made it appear that his adoption was a condition without which the bequest was not to operate. The will, in short, was that there should be an adopted son who should take the testator's property. There was a continuous series of provisions showing that only as adopted son was this legatee in the testator's mind.

Cozens-Hardy, Q.C., replied, adverting to the provision that, in a certain event which had not occurred, the executors were to choose who should be adopted; and arguing that there was no sign, on the part of the testator, that he was actuated by the desire which ordinarily operated in bringing about an adoption, by, or for a Hindu who had no son.

Afterwards, on the 12th July, their Lordships' judgment was delivered by

(1) (1892) 19 Calc., 452; L. R., 19 I. A., 101.

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KARAMSI MADHOWJI v. KARSANDAS NATHA.

LORD HOBHOUSE:—The suit in which this appeal is presented was instituted in the year 1887 on the original side of the High Court of Bombay to procure an authoritative construction of the will of Kessowji Jadhowji. He was a wealthy Hindu, who made his will on the 8th February, 1886, and died the next day. The appellant claims to be entitled to his residuary estate.

The testator was the son of Jadu Asar, who had other children. The testator had one child, a son named Liladhar, who married Ladkavahu, and in his turn had one child, a daughter named Kesserbai. Liladhar predeceased the testator. Ladkavahu has died, but Kesserbai is still living. The testator had two nephews: one named Karsandas, who is one of his executors, and is stated to be his nearest reversionary heir, and another whose son is the appellant Karamsi.

The will is written in Gujaráti. The version used in this suit is by the translator of the High Court. In the first 27 clauses the testator gives a great number of legacies and directions about his property. The 28th clause is as follows:—

"28. There is my nephew Madhowji Katchra's son Karamsi Madhowji now (living) He is about nine years of age. It is my wish to adopt him as my son. If I should not be able to do so in my life time, then my son Liladhar's widow is to take the said Karamsi in adoption. His adoption ceremony (*dattoudhan*) is to be performed My property which may remain as a residue after all the things mentioned in my will have been done I give to this lad as (his) inheritance. And (I) appoint (him) as my heir. Choru Liladhar's widow Ladkavahu is to get him betrothed (the outlays being made) out of my property. For the same about Rs. 5,000 are to be spent."

By the 29th and 30th clauses he directs that after Karamsi is adopted he shall take the name of Kessowji; and provides for the costs of his marriage and for his residence, which till he is 18 is to be with Ladkavahu. By the 31st clause he directs his executors to make over the property to Karamsi on his attaining 21, if his conduct is good, with alternative provisions if his conduct is bad, in favour of a well-behaved son. The 46th clause is as follows:—

"46. In the twenty-eighth clause above it has been directed (that a son) should be adopted. In accordance therewith after the said Karamsi shall have been adopted should he die without (leaving) any descendants then Choru

Ladkavahu is duly to adopt out of my father Jadu Asai's descendants any lad who may be found fit. And if the said Ladkavahu should not be living at that time then (any) lad (begotten) of the loins of my father Jadu Asai who may appear to my executors to be fit, is duly to be appointed my heir. And to him my property as mentioned above is duly to be given in inheritance. And his adoption ceremony is to be performed and the outlays on the occasion of his marriage also are duly to be made as written above."

The difficulty has arisen from the circumstance that Ladkavahu refused to adopt Karamsi. The cause was heard in October, 1887, when Ladkavahu was living, before Mr. Justice Farran, now Chief Justice of Bombay, who decided that until adoption Karamsi was not entitled to the residue. After Karamsi attained majority he obtained leave to appeal; and in February, 1896, the Court of Appeal affirmed the decree below. The present appeal is from that Court. The respondents are the executors, one of whom has an interest to support the existing decree.

The controversy turns on the construction to be given to the sentence "My property which may remain as a residue after all the things mentioned in my will have been done I give to this lad as his inheritance." That sentence admits of being read in two different ways with equal facility. The words "after all things mentioned in my will have been done" may be attached to the preceding word "residue"; or making a pause at "residue," the same words may be thrown forward and attached to "I give". On the former reading the disputed words merely show what is meant by "residue"; on the latter they import a condition precedent to the gift.

Mr. Justice Farran arrived at his conclusion without leaving on record any verbal criticism. The learned Judges of the Court of Appeal express themselves thus:—

"Clause 28 of the will is as follows:—'To this boy all the things (*kam*, literally business, work, things to be done) mentioned in my will having been done, I give the residue of my estate as his inheritance and I appoint him my heir.' That clearly means that he is first to be adopted, adoption being one of the things mentioned in the will."

It is not clear whether they mean to say that the words between commas are a clearer translation than the official one, or only to put their own construction on the words as they stand in the official translation. On the expressions used by the

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learned Judges no question can be raised. But their Lordships not being able to read the original for themselves, must abide by the official translation.

Of course the controversy takes the form of subjecting the will to a minute analysis in order to extract inferences in favour of or adverse to each of the two possible constructions, and that has been done very thoroughly at the Bar. On the appellant's side it is forcibly argued that the construction adverse to him leads to an intestacy, which it must be presumed that one who is making his will does not intend. It is also urged that, if the testator had attached primary importance to adoption, he would have taken care to place his meaning beyond doubt; that if it were so essential, it was an adoption not to himself but to his dead son, which he might have secured before his own death; that he must have known that after his death Ladkavahu would be a free agent, and might disregard his wishes; and that the words "inheritance" and "heir" are just as compatible with the idea of taking directly by devise as with that of taking in the character of grandson and heir through adoption. On the other hand, it is insisted that the wish for an adopted son is placed first in order, that it is an express condition precedent to the assumption of the testator's name, that it is necessarily implied in the direction that the boy shall reside with Ladkavahu, that the gifts over on failure of Karamsi's issue are only to take place after his adoption, and that there is no gift over unless he is adopted; in short, that the testator assumed as a basis of his dispositions that there would be an adoption, and that the alternative did not occur to him. Thus, it is urged, with the failure of adoption the whole structure of the will fails; and there ensues an intestacy, not as desired or contemplated by the testator, but because he took for granted the existence of a condition which has not come to pass.

On such a peculiar will it is hardly a profitable task to weigh each verbal criticism in very nice scales, the more particularly as several of the expressions relied on are double-edged and may be used one way or the other with nearly equal force. Their Lordships confine themselves to saying that the meaning of the

testator is very obscure, but that the arguments adduced to support the decree are such that they are not justified in disturbing it. They will humbly advise Her Majesty to dismiss the appeal. The costs must follow the result, and the appellant must pay them.

Appeal dismissed.

Solicitors for the appellant —Messrs. *Brown, Ringrose, and Lightbody.*

Solicitors for the respondent:—Messrs. *Nicholl, Manisty, and Co.*

PARSI CHIEF MATRIMONIAL COURT.

Before Mr. Justice Fulton.

KAWASJI EDALJI BISNI, PLAINTIFF, *v* SIRINBAI, DEFENDANT *

1898. *September* 9.

Parsis—Marriage—Husband and wife—Suit by husband for restitution of conjugal rights—Defence to such suit—Agreement for separation a good defence—Parsi Marriage and Divorce Act (XV of 1865), *Sec.* 36

Under section 36 of the Parsi Marriage and Divorce Act (XV of 1865) a contract by which a husband has agreed to allow his wife to live separate is a good defence to a subsequent suit by him for restitution of conjugal rights

SUIT by plaintiff (husband) for restitution of conjugal rights.

The suit was filed in July, 1898. The plaint stated that the parties had been married in January, 1875, that in September, 1893, the defendant had left the plaintiff's house and had since lived separately.

The defendant pleaded (*inter alia*) that in January, 1896, the plaintiff had filed a previous suit against her for restitution of conjugal rights to which she had pleaded his cruelty, and she on her part had about the same time filed a suit against him for judicial separation, that both suits were fixed to come on for hearing on 10th July, 1896, but that on the 9th July the parties had come to an agreement, in consequence of which both suits were dismissed.

By this agreement the plaintiff (*inter alia*) agreed to allow the defendant to live separate from him and to make her a monthly

* Suit No. 4 of 1898.

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allowance during their joint lives. The agreement was in writing and was produced in Court.

The defendant pleaded that she had, in fact, carried out her part of the said agreement, and she contended that by the agreement the present suit was barred and should be dismissed.

Branson for the plaintiff.

Macpherson for the defendant.

The following authorities were referred to:—Parsi Marriage and Divorce Act (XV of 1865), Sec. 36, Act IV of 1869, Secs. 32, 33; *Gibbs* v. *Harding* [1], Brown on Divorce, p. 189; *Marshall* v. *Marshall* [2]; *Clark* v. *Clark* [3], *Russell* v. *Russell* [4], *Besant* v. *Wood* [5].

FULTON, J.:—I think that under section 36 of the Parsi Marriage and Divorce Act, 1865, a contract, under which the husband has agreed to allow his wife to live separate, may be pleaded by her as a defence to a suit for restitution of conjugal rights.

The material words of the section are as follows:—

"Where a wife shall have.....without lawful cause ceased to cohabit with her husband, the party... with whom cohabitation shall have so ceased may sue for the restitution of his .. conjugal rights, and the Court, if satisfied of the truth of the allegations contained in the plaint and that there is no just ground why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly."

The questions then arise:—

(1) Whether an agreement for separation made by the husband renders it lawful for his wife to live apart from him? and

(2) Whether the existence of such an agreement is a just ground why relief should not be granted?

To both questions the answer must be in the affirmative.

Unless the word "lawful" was used by the Legislature in some peculiar and technical sense, it seems clear that, if a husband has contracted to allow his wife to live apart, and she chooses to do so, she has a lawful cause for so doing. Her will

(1) (1870) L R 5 Ch, 336.
(2) (1879) 5 Pro. D., 19.
(3) (1885) 10 Pro D., 188.
(4) (1895) Pro. 315 at p. 333.
(5) (1879) 12 Ch. D, 605.

doubtless is the cause, and the existence of a contract makes it "lawful." It can hardly now be suggested that such a contract is void as immoral or contrary to public policy. Such contracts have long been enforced by injunction by the Courts of equity in England, and are now accepted as defences to claims for restitution of conjugal rights by the Probate Division of the High Court.

The English law on the subject is very clearly explained by Lopes, L. J., in *Russell* v. *Russell*(1) as follows:—

"The effect of the Judicature Acts has been indirect, but, at the same time, very important. It is, however, confined to separation deeds. These, as is well known, were treated as illegal and void by the Ecclesiastical Courts: see *Westmeath* v. *Westmeath*(2). But when it was settled, as it ultimately was (see *Besant* v. *Wood*(3)), that the Court of Chancery would restrain a suit for restitution of conjugal rights if brought contrary to a covenant not to institute such a suit, and when the Judicature Acts made the Divorce Court a Division of the High Court and abolished injunctions to stay actions, and substituted in all branches of the High Court defences instead of such injunctions, it followed that a separation deed containing a covenant not to sue for restitution of conjugal rights became a defence to a suit for such restitution. see *Marshall* v *Marshall*(4), *Clark* v. *Clark*(5)."

In this country between Pársis the contract of separation appears as binding as a similar contract between Christians in England. It was not suggested that it was specially inconsistent with the Pársi customs of marriage, and even if it were, it would be a question for argument whether the existence of such customs could remove such a contract from the scope of the Contract Act; or could invalidate it as an immoral contract. Considering how fully the Pársis have adopted the Western ideas of marriage, and how readily they have accepted the Act of 1865, it is not likely, I think, that it will ever be contended that such a contract is void. In the present case certainly no such contention was raised.

Mr. Mantri, however, objected to the issue on the ground that it did not arise under the provisions of the Act in a suit for restitution of conjugal rights. That objection, however, can only

(1) (1895) P. at pp. 332, 333.
(2) (1827) 2 Hagg. Ecc. Supp., 1, 115.
(3) (1879) 12 Ch. D., 605.
(4) (1879) 5 P. D., 19.
(5) (1885) 10 P. D., 198.

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be sustained if it can be held that the word "lawful" refers not to the law of this country to which Pársis are subject, but to the ecclesiastical law of England to which they are not. That the Pársis of Bombay are not subject to the ecclesiastical law, was settled by the decision of the Privy Council in *Ardeseer* v. *Perozeloye* [1], and though their customs have been modified by Act XV of 1865, they are no more now governed by ecclesiastical law than they were before. The mere fact, then, that in 1865, when this Act was passed, the Divorce Court of England was still administering on this point the old ecclesiastical law, which treated deeds of separation as unlawful, can give no support to the argument that, in using the word "lawful" in section 36 of the Act, the Legislature meant the criterion of legality to be not the law of this country applicable to Pársis, but the Church law of the people of another religion in England. It is true that the provisions of Act XV of 1865 are in many respects similar to the marriage law administered in England since 1857, and in construing it, the decisions of the Divorce Court and Probate Division may often be useful guides; but it must be always remembered that though the laws are in certain points similar, they are not the same, and that the decisions under the one can only assist by analogy in the construction of the other. As regards the point now under consideration, it seems to me that the word "lawful" is a plain English word and must be construed in its ordinary sense as having reference to the law to which the parties are subject. If it had been intended, as in Act IV of 1869 applicable to Christians, to exclude a defence of this sort, a section like 33 of that Act would have been necessary.

On the second question my decision necessarily follows my decision on the first. If it is lawful for the wife to stay away, it would not be just to give the husband a decree directing her return. (The rest of the judgment is not material to this report.)

Attorney for plaintiff:—Mr. *K. J. Mantri.*

Attorneys for defendants:—Messrs. *Hiralal, Mulla and Mulla.*

(1) (1856) 10 Moo. P. C. 375.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

SHIVRUDRAPPA KRISHNAPPA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* BALAPPA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1898. *April* 14.

Landlord and tenant—Agreement to occupy for a term—Permissive occupation—Expiration of term—Suit for possession—Limitation—Limitation Act (XV of 1877), Arts. 113, 139 *and* 141

Plaintiffs sued to recover possession of a certain house from the defendants, resting their claim on a certain document, dated the 3rd May, 1880, executed by the defendants' father Mallappa to the plaintiffs' father Krishnappa. In this document Mallappa admitted that the house belonged to Krishnappa and promised to vacate it at the end of two years from the date of execution. The document being presented for registration on the 18th May, 1880, Mallappa denied its execution, but after inquiry the District Registrar ordered it to be registered. The lower Court dismissed the suit as barred by limitation (either by article 113 or article 144 of the Limitation Act, XV of 1877)

Held, reversing the decree and remanding the case, that the suit was not barred By the agreement the tenancy or permissive occupation was to end on 3rd May, 1882. Either under article 139 or 111 the plaintiff had twelve years from that date within which to sue.

SECOND appeal from the decision of R. A. Graham, Assistant Judge, F. P., of Sholapur-Bijapur.

Suit to recover possession of a house.

This suit was brought in September, 1893. The plaintiffs rested their claim on a document, dated the 3rd May, 1880, executed to their father Krishnappa by the defendants' father Mallappa, in which Mallappa admitted the house to be Krishnappa's and promised to vacate it at the end of two years. This document was presented for registration on the 18th October, 1880. Mallappa then denied its execution, but after inquiry the District Registrar ordered it to be registered. This document was in the following terms:—

"I, Mallappa, son of Samana, give in writing this deed of agreement in the Fasli year 1289 as follows:— * * There is close to your big house, to the south of it, your other small house. * * . The house was given to me by

* Second Appeal, No. 1143 of 1897.

1898.

SHIVBUD-DAPPA v. BALAPPA.

you. Now you told me that you wanted the house and asked me to vacate and give it over to you. As to that I told you that I could not find another house for my residence so as to vacate and make over to you your house: hence I have begged and obtained from you two years' time from this day during which I am to live in the said house. Wherefore I will live in the said house for two years from this date, and when the two years are over, on the following day I will vacate the said your house and make it over to your possession; I have not any right to the said house * * *. 3rd May, 1880."

The first defendant (*inter alia*) pleaded limitation. The second defendant did not appear. The Subordinate Judge allowed the plaintiff's claim. On appeal by the defendants, the Judge reversed the decree, holding that the suit was time barred. The following is an extract from his judgment:—

'This document (kararpatra) was presented for registration on 18th October, 1880, but defendants' father then denied the execution of it. The District Registrar, after a summary inquiry, ordered that the document should be registered, and it was registered in December, 1880. Now, presuming the kararpatra to have been duly executed, the plaintiffs must sue either on it, as evidence of contract, for specific performance of the contract, or on their general title. In the former case, the period of limitation under article 113 of the Limitation Act would be three years from the date fixed for the performance, *i. e.*, 3rd May, 1882. In the latter case, the twelve years' period would begin to run from the time when plaintiffs' title was denied—in this case, 18th October, 1880. In either case, the suit not having been filed till 1893, is clearly barred."

The plaintiffs preferred a second appeal.

Narayan G. Chandavarkar for appellants (plaintiffs):—The Assistant Judge was wrong in applying article 113 of the Limitation Act and in holding that the suit was time-barred. A licensee cannot deny his licensor's title. Under section 139 of the Limitation Act, the cause of action accrued to the licensor on the expiration of the period of the license. Under the document of 3rd May, 1880, the defendant became a tenant for a fixed term. There was no rent provided for, but he was allowed to remain in possession for two years. Adverse possession could not commence until after the expiration of the two years. The tenancy expired in May, 1882, and the suit being filed in September, 1893, was not time-barred.

Mahadeo V. Bhat for respondents (defendants):—The first defendant was in actual possession of the house before the date of the agreement. The agreement was an attempt made

by plaintiff to make the first defendant acknowledge his title. Our adverse possession commenced from the date on which we denied execution of the agreement, that is, from the 18th October, 1880. The suit being brought more than twelve years after that date is barred. No rent was reserved. We were in the position of a licensee. Article 130 would, therefore, not apply.

CANDY, J. :—Plaintiffs, the sons of one Krishnappa, sued defendants, the sons of one Mallappa, to recover possession of a house, with regard to which Mallappa was said to have passed a registered agreement, dated 3rd May, 1880, acknowledging Krishnappa's ownership of the house, reciting that he, Mallappa, was occupying the same by permission of Krishnappa, and promising to vacate the same on the expiry of two years from that date, 3rd May, 1880. The plaint was filed in September, 1893. Defendants denied the genuineness of the agreement, and pleaded that the house was their own property and that the claim was barred by limitation. The Subordinate Judge found that the agreement was proved, that plaintiffs were owners of the house, and that the claim was not time-barred. He, therefore, awarded the claim. On appeal the Assistant Judge, F. P, reversed that decision, holding that the claim was time-barred.

It appears that when Krishnappa presented the agreement for registration on 18th October, 1880, Mallappa "denied its execution." An enquiry was held by the District Registrar, who ordered the document to be registered. On these facts the Assistant Judge held that "presuming the kararpatra to have been duly executed, the plaintiffs must either sue on it as evidence of a contract, for specific performance of the contract, or on their general title. In the former case the period of limitation under article 113 of Limitation Act would be three years from the date fixed for performance, *i.e.*, 3rd May, 1882. In the latter case the twelve years' period of limitation would begin to run from the time when plaintiffs' title was denied,—in this case 18th October, 1880."

We are unable to agree with the view taken by the Assistant Judge. In our opinion, article 113 of the Limitation Act has no

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SHIVRUDRAPPA v. BALAPPA.

application. Whether the agreement of 3rd May, 1880, be taken by itself, or as part of a compromise effected between Krishnappa and Mallappa regarding the division of certain property including this house, the plaintiffs are entitled to rely solely on this registered document as the basis of their claim to recover possession of the house. By that document, Mallappa admitted that he was in permissive occupation of the house, and he promised to vacate the same on the expiry of two years from that date. In *Gobind Lall Seal* v. *Debendronath Mullick*(1) it was held that a suit for the recovery of immoveable property against a person who had originally been in mere permissive occupation or possession accorded on the gound of charity or relationship is governed by Act XV of 1877, Schedule II, article 144. Mr. Justice Pontifex remarked that "a permissive occupation, which has considerable resemblance to a tenancy-at-will, is of extremely frequent occurrence in this country in consequence of the family habits and natures of its people;" and Garth, C. J, said "the case then comes under article 139 of the Limitation Act, if the relation between the parties is that of landlord and tenant; or under article 144, if there is no such relation." We do not think that the period of limitation is altered by the fact that in this case Mallappa is said to have executed a written agreement acknowledging his permissive occupation and promising to vacate on the expiry of two years. Krishnappa, whether as landlord or as licensor, was not bound to sue to eject Mallappa, whether as tenant or licensee, within three years of the date on which Mallappa agreed to vacate. If the argument of the Assistant Judge is correct, then article 139 of the Limitation Act can have no application when the tenant contracts that the tenancy shall determine on a certain date. Where an agreement specifies the term upon which the tenancy is to end, on the expiry of that term the tenancy is determined *ipso facto*. See the cases collected by Mr. Starling in his Notes on the Limitation Act, 3rd Edition, under article 139, page 281. Here by the agreement the tenancy or permissive occupation was to end on 3rd May, 1882. Either under article 139 or under article 144 plaintiffs had twelve years within which to sue. The Assistant Judge remarked that Mal-

(1) (1880) 6 Calc., 311.

lappa denied Krishnappa's title on 18th October, 1880. But according to the record all that Mallappa did then was to deny execution of the agreement. The pleader for respondents has been unable to point to any evidence showing that Mallappa then denied Krishnappa's title. It is unnecessary, therefore, to determine whether, if Mallappa had then denied Krishnappa's title, or his own permissive occupation, Krishnappa or his sons would have been bound to sue within twelve years from that date. Possibly Krishnappa might then have sued at once to eject Mallappa: or he might have elected to hold to the written agreement. However that might be, we are unable to adopt the view that, taking the agreement of 3rd May, 1880 to be proved, the claim is barred by limitation.

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SHIVLINGAPPA v. BALAPPA.

We must, therefore, reverse the decision of the Assistant Judge and remand the appeal for disposal on the merits. If the agreement is proved, then plaintiffs are entitled to succeed so far as limitation is concerned. If the agreement is not proved, then the basis of their claim fails. Costs to be costs in the cause.

Decree reversed and appeal remanded.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

DATTARAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGARAM AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1898.
April 20.

Guardian—Certificated guardian—Mortgage by such guardian without Court's permission—Validity of such mortgage—Sanction under Civil Procedure Code (Act XIV of 1882), *Sec.* 305—*Guardians and Wards Act (VIII of* 1890), *Secs.* 29 *and* 30—*Act XX of* 1864.

Anant was the owner of the property in dispute. He mortgaged it with possession to defendant No. 1 in 1884. Anant died leaving an adopted son Vithal, a minor. Thereupon one Vasudev was appointed by the District Court to be guardian of the person and property of the minor under Act XX of 1864. In September, 1890, Vasudev mortgaged the same property to plaintiff with the sanction of the Subordinate Judge's Court obtained under section 305 of the Code of Civil Procedure (Act XIV of 1882) In 1895 the plaintiff as second mortgagee brought this suit to redeem the earlier mortgage of 1884.

* Second Appeal, No. 1216 of 1897.

1898.

DATTARAM v. GANGARAM.

Held, that Vasudev, as certificated guardian, had no power to mortgage the minor's property without the previous permission of the Court which had appointed him to act as guardian, and that the sanction of another Court given under section 305 of the Code of Civil Procedure (Act XIV of 1882) was not sufficient to legalize the mortgage.

Held, also, that such mortgage would have been absolutely void under Act XX of 1864, but was only voidable under section 30 of Act VIII of 1890 at the instance of any other person affected thereby.

Held, further, that defendant No. 1, the original mortgagee, was not affected by the plaintiff's mortgage, and that the only person really affected by that mortgage was Vithal, the owner of the equity of redemption, who was a necessary party to the suit.

SECOND appeal from the decision of Ráo Bahádur Thakurdas Váthuradas, Assistant Judge of Ratnágiri.

One Anant Narayan Apte was the owner of the land in dispute. He mortgaged them to defendant No. 1 by a mortgage-deed dated 13th April, 1881.

Anant died, leaving an adopted son Vithal, a minor.

On the 30th January, 1889, Vithal's natural father Vasudev Krishna was appointed guardian of his person and property under Act XX of 1864 by the District Judge of Ratnágiri.

On the 10th September, 1890, Vasudev mortgaged the minor's property, including the land in dispute, to the plaintiff, with the sanction of the Subordinate Judge of Vengurla granted under section 305 of the Civil Procedure Code (Act XIV of 1882).

In 1895 the plaintiff as puisne mortgagee filed the present suit to redeem the earlier mortgage of 13th April, 1881.

The Court of first instance dismissed the suit, holding that the plaintiff's mortgage was invalid, as it had not been effected with the previous sanction of the District Court under section 29 of the Guardians and Wards Act (VIII of 1890).

This decision was upheld, on appeal, by the Assistant Judge.

His reasons were as follows:—

"The mortgagor Vasudev, who is now dead, was not an ordinary guardian, but a guardian appointed by the District Court under the Bombay Minors' Act XX of 1864. That Act was repealed on the 1st July, 1890, but the appointment of Vasudev as the guardian of the ward Vithal was kept alive by section 2 of the

Guardians and Wards Act, 1890. Before passing the mortgage dated 10th September, 1890, he ought to have obtained the sanction of the District Court under section 29 of the Act. But he did not do so. The mortgage is, therefore, illegal and unauthorized, and confers no right upon the plaintiff: see the cases cited in *Manishankar* v. *Bai Muli*(1).

"It is said that the mortgage was made for the benefit of the ward and with the sanction of the lower Court under section 305, Civil Procedure Code. Such a sanction, as also such beneficial purpose, assuming that the purpose was beneficial, would not supply the place of the permission of the District Court necessary under the provisions of the Guardians and Wards Act, 1890."

Against this decision plaintiff preferred a second appeal to the High Court.

V. G Bhandarkar for appellant:—Section 29 of the Guardians and Wards Act (VIII of 1890) provides, no doubt, that a guardian appointed by the Court cannot mortgage any part of the immoveable property of his ward without the previous permission of the Court. But where the guardian mortgages the property with the sanction of the Court under section 305 of the Code of Civil Procedure, the mortgage is legal and valid. The mortgage is the act of the Court and not of the guardian. Moreover, section 30 of Act VIII of 1890 distinctly provides that the transaction is not absolutely void, but voidable only at the instance of any other person affected thereby. The original mortgagee who resists our claim is not affected by our mortgage. To him it is immaterial who pays off his mortgage money. The only person who can be said to be affected by our mortgage is the minor on whose behalf the guardian professed to act, but he is not a party to the suit.

H. C. Coyaji (with *Manekshah Jehangirshah*) for respondents was not called on.

PARSONS, J.:—The equity of redemption of the property which is sought to be redeemed in this suit from the original mortgagee, who is the first defendant, was mortgaged to the plaintiff by a judgment-debtor, who had obtained a certificate under section 305 of the Code of Civil Procedure, authorizing him to do so. The judgment-debtor, however, was not the real owner of the property, but was the guardian for the suit of the minor

(1) (1888) 12 Bom., 636.

1898.

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to whom the property belonged, and he had also been appointed the guardian of his property under the Minors Act, XX of 1864. Under section 29 of the Guardians and Wards Act, 1890, which continued his guardianship and now governs the case, he was prohibited from mortgaging the property of his ward without the previous permission of the Court.

It was first argued that the sanction of the Court under section 305 of the Code of Civil Procedure was sufficient to legalise the transfer, but this clearly is not right, for the Court mentioned in section 29 of the Guardians and Wards Act is, according to the definition contained in section 4 (5), the Court which appointed or declared the guardian in pursuance of an application under this Act, that Court in the present case was the District Court of Ratnágiri, and the guardian had not obtained the permission of that Court to the mortgage. Then it was argued that the mortgage was the act of the Court, and not of the guardian, but the Court does not under section 305 execute any mortgage; all it does is to authorize the judgment-debtor to do what otherwise would be void by reason of the provisions of section 276, *viz.*, to mortgage property while under attachment. The mortgage when effected is the act of the judgment-debtor alone.

Being thus made without the previous permission of the Court the mortgage would under the provisions of the Act of 1864 have been absolutely void and would confer no title at all upon the plaintiff (see *Cholsi Motilal* v. *Munsang*[1]). This, however, is not so under the Act of 1890. Section 30 of that Act expressly makes such transfers voidable only. The words used are "voidable at the instance of any other person affected thereby." The only person mentioned in the section is the guardian, so that any other person apparently, except him, would have the right to declare the transfer void, provided he was affected by it. We do not think that the original mortgagee in the present case can be in any way affected by the subsequent mortgage of the equity of redemption He has a right to his money only, and it cannot make any difference to him whether he is paid by A or B. The other person really affected by the mortgage is the owner of the

(1 P. J. for 1898, p. 5

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equity of redemption, but he has not been made a party to the suit, and we do not know what view he takes of the mortgage. The Judge of the lower Court rightly says that he is a necessary party to the suit (see section 85 of the Transfer of Property Act, 1882) and would have joined him and have proceeded with the suit had he not held the mortgage void.

As we hold that the mortgage is not void we must reverse the decree of the lower appellate Court and remand the case for a decision on the merits after Vithal has been joined as a defendant. Costs to be costs in the cause, to be apportioned by the Court passing the final decree.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BAI MANGAL (ORIGINAL DEFENDANT), APPELLANT, *v.* BAI RUKHMINI (ORIGINAL PLAINTIFF), RESPONDENT.*

1898.
April 20.

Hindu law—Daughters—Maintenance—Widowed daughters—Their right of maintenance out of their father's estate.

According to Hindu law, it is only the unmarried daughters who have a legal claim for maintenance out of their father's estate. The married daughters must seek their maintenance from the husband's family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs.

SECOND appeal from the decision of Ráo Bahádur V. V. Paranjpe, Additional First Class Subordinate Judge, A. P., at Broach.

One Sanmukhram died, leaving a widow Bai Rukhmini, and a daughter Bai Mangal by another wife.

Bai Mangal was a widow in indigent circumstances, without any provision from her husband's family. She was, therefore, supported by her father during his life-time.

After Sanmukhram's death, Bai Rukhmini filed a suit to recover possession of the deceased's property from Bai Mangal.

* Second Appeal, No. 926 of 1897.

1898.

BAI MANGAL v. BAI RUKHMINI.

The Court of first instance held that though the plaintiff was her husband's heir, the defendant, as a widowed daughter in indigent circumstances, was entitled to receive maintenance out of her father's property. The Court, therefore, awarded to her for life a portion of her father's property in lieu of maintenance.

This decision was upheld, on appeal, by the First Class Subordinate Judge, A. P., at Broach.

Against this decision a second appeal was preferred to the High Court.

K. M. Jaiheri (with *M. K. Mehta*) for appellant.

G. K. Parekh for respondent.

RANADE, J.:—In this case the dispute lies between the respondent-plaintiff Bai Rukhmini, who is the widow of the deceased Sanmukhram, and the appellant Bai Mangal, who is the daughter by another wife of the same Sanmukhram. Bai Rukhmini brought the original suit to recover possession of Sanmukhram's property as his sole heir, and this claim was resisted by Bai Mangal on various grounds. Among other defences she urged that, at the time of Rukhmini's marriage, there was an agreement that Rukhmini should claim no interest in the property in case she had no male issue. Bai Mangal also pleaded a caste custom excluding widows from succession, and she further claimed that Sanmukhram had made a will appointing her as his heir and successor.

All the three contentions were disallowed by both the lower Courts, but while recognizing Rukhmini's claim to succeed as heir, they held that Bai Mangal, as widowed daughter in indigent circumstances, who had no provision from her husband's family, had a right to be maintained, and they accordingly awarded to her for her life a part of her father's estate. The appellant Bai Mangal raised before us the same contentions which she had unsuccessfully urged in the Courts below, and these were disposed of by us in the course of the hearing of the appeal. Bai Rukhmini put in cross-objections, which made it necessary that the points of Bai Mangal's indigence, and the inability of her husband's relations to provide for her, should be expressly inquired into, and an issue was sent down to the lower Court, which has recorded a finding in favour of Bai Mangal.

The decision of the respondent's main contention thus turns upon the question of law—whether, and how far, a widowed daughter, who has no provision to fall back upon made for her by her husband's family, can claim maintenance out of her father's estate to which his heir succeeds as owner?

In support of their view that the widowed daughter has such a right to claim maintenance, both the Courts below have chiefly relied upon Mayne's Hindu Law. Mayne (section 408) lays down that a daughter "is entitled to maintenance until marriage, and to have her marriage expenses defrayed. After marriage, the maintenance is a charge on the husband's family, but if they are unable to support her, she must be provided for by the family of the father." The only authorities cited by Mr. Mayne for this last proposition are Macnaghten, Vol. II, page 118, and West and Buhler, pages 215, 437. On page 118 of his second volume, Mr. Macnaghten gives the details of a precedent in which the widow and daughters and nephew of a deceased person were allowed to share in certain proportions the estate of their deceased husband, father, and uncle respectively. It is clear that no such simultaneous rule of succession obtains in Hindu law, and at any rate the daughters in this case were not allowed maintenance. The facts of the case have obvious reference to a partition made by brothers after their father's death, when a share equal to a son's share is set apart for the mother, and a quarter share is set apart for the sister by way of provision for the latter's marriage and maintenance till then. This case, therefore, can hardly be relied upon as an authority in the present dispute. As regards the references to West and Buhler, there is a statement on page 68 where it is mentioned that the widow and her daughters are entitled to maintenance from the united co-parceners or successors to the separate estate. This reference obviously applies to unmarried daughters, for whom provision has to be made till they are married. The authorities cited—*Manhoonnur* v. *Bhugoo*[1], *Ramajee* v. *Thukoo Baee*[2]—support this view. On page 238, it is further observed that, next after the husband's family, the responsibility of supporting the daughters rests on their father's family. On page 248, specific reference is

(1) (1822) 2 Bom., 157. (2) (1823) 2 Borr., 485 at p. 497.

1898.

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made to two cases reported in 2 Strange, pages 83, 90, where the claim of a widowed sister, left destitute by her husband's relations, to be maintained by her brother's widows was allowed. There is a further reference on page 137 which is obviously meant for unmarried daughters, who must be maintained by their father or brothers till they are disposed of by marriage. The decisions reported in 2 Strange, pages 83, 90, are thus the only direct authorities which bear upon the present dispute.

The responsibility of the father's family, next after the husband's family, referred to on page 233 is obviously a moral responsibility, for on failure of the father's family, the same responsibility is thrown on the caste, and, finally, on the king. Against Mr. Strange's two precedents, for which it may be noted no authorities are cited, may be set a later decision of the Madras High Court—*Ilata Shavatri* v. *Ilata Narayanan*[1]. Sir Thomas Strange in his first volume, page 172, no doubt mentions this charge of maintenance of unmarried damsels and indigent widowed daughters and sisters in the same category; but a careful consideration of the original texts leaves no room for doubt that, while the first charge is legally enforceable, the other one is more or less an imperfect obligation. This distinction was emphasized in the leading case on the law of maintenance on this side of India—*Lakshman* v. *Satyabhamabai*[2]. Every father of a family has a sort of moral duty to support his dependent male and female relations, but there are certain persons so related in respect of whom the obligation is legal, and in regard to others the texts should be interpreted as being intended for exhortation and recommendation. The support of the widow and of unmarried daughters stands on a very different footing from the support of widowed daughters. The destitute and unprovided for married daughter is allowed preference over her better provided sister. This is the only distinction the law recognizes in favour of the destitute widow.

The unmarried daughters are preferred to married, for the simple reason that they have no support to fall back upon till they are disposed of in marriage, either by their father, or by the brothers who succeed to his property by inheritance or partition. In

(1) (1863) 1 Mad. H. C. Rep., 372. (2) (1877) 2 Bom., 494.

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Vyavahár Mayukha (Stokes' Edition, page 97), we have an express text, which directs that "the maintenance of the daughter of a widow excluded must be provided for by her brothers. If uninitiated, *i.e.*, unmarried, she will take a share. After that (marriage), her husband shall support her." In the case of the daughters of disqualified or excluded heirs, the same rule is laid down in Mitákshara. "Thus daughters must be maintained till they are provided with husbands" (Stokes' Mitákshara, page 457; see also Vyavahár Mayukha, Stokes' Translation, page 109; Dattaka Chandrika, page 662, Stokes' Translation). In Dayabhaga, page 233, it is expressly mentioned that daughters do not take along with the sons by right of inheritance. The part given to the daughters at partition is meant to be a provision for marriage, and may be less than a quarter—Stokes' Translation, page 233. In fact, all the text-writers appear to be in agreement on this point—namely, that it is only the unmarried daughters who have a legal claim for maintenance. The married daughters must seek their maintenance from the husband's family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs.

This being the general bent of the law texts and the commentators, we must hold that the appellant has not established her title to receive maintenance from the property of her father. It may be noted that she herself did not seek maintenance, but claimed to be owner. It is also not clear that she is absolutely without any provision. The evidence goes to show that she owns a house and a *yajman vritti*; however on this point we have no finding recorded by the lower Court.

We vary the decree of the lower Court, and award the respondent-plaintiff's claim in full. The appellant should pay all the costs of the respondent, and bear her own. Court-fees throughout payable by plaintiff had she sued in the usual form to be calculated and paid by the plaintiff in the first instance.

Decree varied.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

1898.
April 21.

RANGO BALAJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* MUDIYEPPA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Evidence—Indian Evidence Act (I of 1872), Secs. 107 and 108—Person not heard of for seven years—Presumption of death—Adoption—Validity of adoption depending on whether natural son alive or dead—Onus of proof—Deed or will conferring estate on a person described as adopted son—Res judicata—Former decree in favour of plaintiff, but issue as to adoption found against him—No appeal open to plaintiff against that finding.

Death is to be presumed after a certain interval (seven years); but there is no presumption as to the time of death. If, therefore, any one has to establish the precise period during these seven years at which a person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor, on the other, upon the continuance of life. There is no presumption of law that because a person was alive in 1877 therefore he was alive in 1878.

One Shankar died in September, 1878, leaving a widow Bhagirbai. The year before his death his only son (Bala), a child of eight years old, had left his home and was never heard of again. A few days before his death, Shankar adopted the plaintiff (his nephew) and executed a deed of adoption, which stated that he had no hope that his son Bala was alive, and that he had, therefore, adopted the plaintiff. The deed further declared the plaintiff to be the owner of all Shankar's property with all the rights of a natural son, but provided that, in the event of the lost son returning, he should have half. In 1892 the plaintiff as Shankar's adopted son brought this suit to recover some of Shankar's property, which was in the hands of the defendants, who claimed it as Shankar's heirs. They (*inter alia*) impeached the plaintiff's adoption.

Held that, in order to recover the property as the adopted son of Shankar, it lay on the plaintiff to prove a valid adoption. It was a condition precedent to prove that, at the date of the adoption, Shankar was without a son. It was, therefore, for the plaintiff to prove that Bala was then dead. There was, at that time, no presumption that Bala was dead, and there being no evidence on the point it was impossible to say when he died, or consequently that the adoption was valid.

Held, however, that plaintiff was entitled to succeed as donee under the deed of adoption (Exhibit A). It was clearly Shankar's intention to give the estate to the plaintiff as being his adopted son. But if the adoption was invalid, the gift had no effect. The *onus* here was on the defendants. It was for them to show that Bala was at that date alive and the adoption, therefore, invalid. That burden they had not discharged, and the plaintiff, therefore, was entitled to a decree.

* Second Appeal, No. 1234 of 1897.

1898.

RANGO v. MUTAPPA

Per FARRAN, C. J.:—Where a deed of gift or will confers an estate upon a named person, because he fills or by reason of his filling a certain character, he is entitled to recover the estate without affirmatively proving that he fills such character. The *onus* of proving that he does not fill the character, which is the reason of the gift, lies upon those who dispute his claim. The whole question is one of *onus* of proof.

The plaintiff had previously sued one Krishnaji, the father of the defendants, in another suit (No. 804 of 1885) to recover certain other lands. In that suit it had been held that the plaintiff was not the adopted son of Shankar, but that nevertheless he was entitled to recover the lands sued for, on the strength of the above stated deed (Exhibit A), and a decree was passed for the plaintiff.

Held that the issue as to adoption in that suit was not *res judicata* in the present suit. In the former suit the plaintiff recovered upon the deed. He could not have appealed from the decree which was in his favour, nor could he under the Civil Procedure Code (Act XIV of 1882) appeal from the finding upon the adoption issue which was against him. Upon that issue there had not been a final decision.

SECOND appeal from the decision of R. A. Graham, Assistant Judge, F. P., at Bijápur, reversing the decree of the Subordinate Judge of Bágalkot.

Suit to recover certain land which had been formerly the property of one Shankar Subaji, the uncle of the plaintiff, and (as the plaintiff alleged) his adoptive father.

The defendants Nos. 2, 3 and 4 were in possession of the property. They denied the plaintiffs' adoption, and claimed to be the heirs of Shankar.

Prior to 1873, Shankar, who owned the lands in question, had mortgaged them to the grandfather of defendant No. 1 with possession, on the terms that they were to be restored free from the mortgage lien on the 31st March, 1888. In 1887 defendant No. 1 surrendered them to defendants Nos. 2, 3 and 4, who, as already stated, claimed to be the heirs of Shankar.

Shankar died on the 13th September, 1878. He had had a son Bala who was about eight years of age. This child had left his home about a year before Shankar's death, and was never heard of again. The plaintiff alleged that, in the belief that Bala was dead, Shankar had adopted him, and on the 1st September, 1878, executed an adoption deed (Exhibit A), by which he gave plaintiff all his property. The following is the material portion of the deed (Exhibit A):—

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"I had a natural son by name Bala aged eight years. It is now about a year since he has run away. He was much searched for, but no trace of him could be found. As I have no hope of his being alive, and in order that my obsequies should be performed and my generation should increase, I have adopted you with the consent of your mother Gangabai and according to caste custom and shastras. Therefore you are the owner of all my moveable and immoveable property. You have all the rights of a natural son * * *. Should fortunately the natural son Bala return, you and he should divide equally my property—he as elder son and you as younger son."

Shankar left a widow Bhagubai. It was admitted, however, that she had been incontinent and had become a Mahomedan and had forfeited all rights of inheritance to Bala if he (Bala) had survived his father Shankar.

The plaintiff and the defendants were related in an equal degree to Bala.

The plaintiff had previously sued one Krishnaji, the father of the defendants Nos. 2, 3 and 4, in another suit (No. 804 of 1885) to recover certain other lands. In that suit it had been held that the plaintiff was not the adopted son of Shankar, but that, nevertheless, he was entitled to recover the lands sued for on the strength of the above stated deed (Exhibit A), and a decree was passed for the plaintiff.

The plaintiff filed this suit in 1892. His claims to Shankar's estate rested either on the fact that he was Shankar's adopted son or upon the terms of the deed (Exhibit A).

The defendants (*inter alia*) denied the adoption and also contended that the question of adoption was *res judicata* by the decision in the former suit (No. 804 of 1885).

The Subordinate Judge held that upon the deed (Exhibit A) the plaintiff was entitled to the lands sued for, and gave him a decree.

On appeal by the defendant the Judge held that the question of adoption was not *res judicata* by the decision of Suit No. 804 of 1885, inasmuch as the decision in the plaintiff's favour in that suit was based upon the deed (Exhibit A). The Judge said:—

"The question as to the plaintiff's adoption being illegal is not *res judicata*, for the decision on that issue was not material for the determination of the case in the view the Subordinate Judge took of the plaintiff's rights. Having

obtained a decree in his favour, plaintiff had no opportunity to question the correctness of that finding."

The Judge further considered the question as to Bhagubai's title to inherit the property as heir of her son Bala (assuming that he was dead), and sent back the following issue to the Subordinate Judge:—

"(*a*) Has Bala's mother Bhagubai lost her right of inheritance in this case by any and what lawful reason and on what date?

"(*b*) If so, who would be the next heir to his property after Bala's death in 1889, in case Bhagubai is excluded from inheriting her son's estate, or has forfeited her rights subsequent to this inheritance?"

On the said issues the Subordinate Judge found as follows:—

"Both sides admit that, as Bhagubai first became incontinent and then became a Mahomedan, she has forfeited her right of inheritance to the estate of her son.

"It appears that in 1889, when Bala was presumed to have died, his heirs (his mother having lost her rights) were plaintiff Rango Balaji, his brother Shrinivas Balaji, the two defendants, and Ramappa Rangappa. They are all equally related to deceased Bala, as will be seen from Exhibit No. 71, and they were the only persons alive in 1889."

On receipt of these findings the Judge held that Bhagubai, notwithstanding her incontinence and subsequent conversion to Mahomedanism, was entitled to inherit the property as the mother of Bala, and that the suit was not maintainable in the present form, because there were other heirs of Bala who were equally entitled to the property along with the plaintiff. He, therefore, reversed the decree and dismissed the suit.

The plaintiff preferred a second appeal.

Branson (with *Ganpat V. Mulgaumkar*) appeared for the appellant (plaintiff):—We contend that the plaintiff's adoption was valid—Tagore's Law Lectures, 1888, p. 194. The defendants contend that it was invalid because Bala was then alive. They must prove that fact. There is no presumption, one way or the other, as to the actual date of Bala's death—Taylor on Evidence, p. 219; *Dharup Nath* v. *Gobind Saran*[1]. Sections 107 and 108 of the Indian Evidence Act deal with the question whether a man is alive or dead, but they do not create any presumption as to the date of

(1) (1886) 8 All., 614.

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RANGO v. MUDIYEPPA.

death. There is no doubt that Bala is now dead. The question is when did he die. Everything ought to be presumed in favour of our adoption. Under the deed (Exhibit A) in case of Bala's return the plaintiff is to take half the property. Under any circumstances there is a gift to the plaintiff of one-half of the property. Bala has never come forward to dispute the deed. Shankar could dispose of his property as he chose. The plaintiff is legally entitled to the property of Shankar under the terms of the deed, which may be looked upon as either a deed of adoption or a will

We also contend that the decision in Suit No. 804 of 1885 brought by the plaintiff against the father of the defendants is *res judicata* as regards the effect of the deed. The Court held in that suit that the deed could be acted on as a deed of title or a deed of settlement.

Scott (with *Mahadeo V. Bhat*) appeared for the respondents (defendants Nos. 2 to 4):—The plaintiff's adoption could only be valid if it be proved that at the date of the adoption the missing son Bala was dead. The plaintiff must prove affirmatively this fact. The *onus* of proof lay on the plaintiff, and he having failed to discharge it, the suit must fail—*Dhondo* v. *Ganesh* [1]. The plaintiff can only claim by virtue of his adoption, because adoption is the essence of the deed.

The finding in the former suit makes the question of the plaintiff's adoption *res judicata*. In that suit it was held that the adoption was invalid and that the plaintiff was entitled to recover the property only as trustee for Bala.

It was argued that the deed, if not a deed of adoption, was at any rate a deed of gift. Even if it be a deed of gift, Bala and his heirs would be entitled to contest it, the property mentioned therein being ancestral.

Branson, in reply:—There is no doubt about the fact of plaintiff's adoption. It is for those who impeach the adoption to prove that Bala was alive at its date. It is not necessary for the plaintiff to prove that Bala was dead.

(1) (1886) 11 Bom., 433.

1898.

RANGO v. MUDIYAPPA.

FARRAN, C. J.:—Shankar Subaji was the owner of the lands in suit. In 1873, he mortgaged them to Mudiappa, the grandfather of defendant No. 1, with possession upon the terms that they were to be restored freed from the mortgage lien on the 31st March, 1888. In 1887, defendant No. 1 surrendered the lands to the defendants Nos. 2—4, who claimed to be the heirs of Shankar Subaji. The plaintiff alleging that he is the adopted son of Shankar Subaji brought the present suit for possession of the lands with mesne profits. The fact that Shankar Subaji went through the form of adopting the plaintiff is not disputed, nor that he executed the adoption deed (Exhibit A) in the plaintiff's favour. The deed, which is registered, is dated the 1st September, 1878. Shankar died on the 13th of the same month. The material portion of the deed runs as follows (His Lordship read the above passage from the deed, and continued:—)

The circumstances were as recited in the deed. Bala never returned, nor was he ever heard of again.

The question to be determined is, whether the plaintiff acquired any right to the property of Shankar either as his adopted son or under the terms of the deed (Exhibit A). The only further fact necessary to be stated is that Shankar left a widow Bhagubai. As to her, it was admitted, upon remand before the Subordinate Judge, that as Bhagubai first became incontinent, and then became a Mahomedan, she had forfeited her right of inheritance to the estate of her son Bala.

In 1889 the heirs of Bala, in the absence of Bhagubai, were the plaintiff Rango Balaji, his brother Shrinivas Balaji, the defendants Konher Krishna and Janardhan Krishna, and one Ramappa Rangappa. These were all related in an equal degree to Bala. The Assistant Judge has found that Bhagubai had not in 1889 by reason of her apostacy and incontinence lost her right to inherit to her son Bala—*Akora Suth* v. *Boreani*[1]; *Kojiyadu* v. *Lakshmi*[2]; *Advyapa* v. *Rudrava*[3]. No argument has been addressed to us upon this branch of the case. Upon the finding upon it the plaintiff cannot have any claim to the estate of

(1) (1863) 2 B. L. Rep., A. C. J., 199. (2) (1881) 5 Mad., 149.
(3) (1879) 4 Bom., 104.

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Shankar except as an adopted son or under the terms of the deed (Exhibit A).

Before considering the plaintiff's claim based upon the above grounds it is necessary to refer to the question of *res judicata* which has been argued before us, but which by the Assistant Judge was decided against the defendants. In 1885, the plaintiff sued (in Suit No. 804 of 1885) to recover two fields not now in suit from Krishnaji Chawdo, the father of the defendants Konher and Janardhan Krishnaji. In that suit it was held that though the plaintiff was not an adopted son of Shankar under the deed (Exhibit A), effect could be given to that deed as a deed of title or a deed of settlement, and the possession of the lands was decreed to the plaintiff (Exhibit 76). The reason for the finding was that as the deed passed in plaintiff's favour by Shankar could only be impeached by the natural son Bala, and as the deed provided that both Bala and the plaintiff should take Shankar's property equally, plaintiff became a trustee for Bala, and as trustee he could eject Krishnaji. I agree with the Assistant Judge that the issue as to adoption found against the plaintiff in that suit does not render the question of the adoption *res judicata* in this suit. The plaintiff succeeded in the former suit upon the deed and recovered possession of the two fields in suit. He could not have appealed from the decree which was in his favour, nor could he under the Code appeal from the finding upon the adoption issue which was against him. Upon that issue there cannot be said to have been a *final* decision. The decree in his favour was made in spite of the finding—see *Thakur Magundeo* v. *Thakur Mahadeo Singh*[1]. Mr. Scott contends that the finding in the former suit, that the plaintiff recovered possession as trustee for Bala, makes that question at all events *res judicata*. I think that this is not so. Bala was not a party to that suit, nor was Krishnaji sued as his heir. The finding of the Court as to the capacity in which the plaintiff recovered possession would not have been *res judicata* either for or against Bala, nor can it be used either for or against the defendants claiming to be heirs of Bala.

(1) (1891) 18 Cal., 647.

1893.

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The main question is whether the plaintiff is the adopted son of Shankar. The answer to that question depends upon whether Bala was alive or dead at the date of the adoption. For the determination of it, in the absence of specific proof, recourse must, I think, be had to the Evidence Act—*Mazhar Ali* v *Budh Singh*[1]; *Dharup Nath* v. *Gobind Saran*[2]; *Dhondo* v. *Ganesh*[3]. Having regard to the provisions contained in sections 107 and 108 of that Act the presumption is that Bala is now dead, but there is, I think, no presumption as to when he died. There is no presumption that he lived for seven years—*Dharup Nath* v. *Gobind Saran* (*supra*). The question is fully discussed in *In re Phene's Trusts*[4]. See *Hickman* v. *Upsall*[5]. If it is necessary to establish the exact date of his death he, upon whom the *onus* of establishing that date is cast, must establish it or otherwise he must fail. Now here the plaintiff is seeking to recover the property in suit as against the natural heirs of Shankar. He must, therefore, I am inclined to think, prove affirmatively that Bala was dead at the date of his adoption. He must show that Shankar was then sonless. This, in the opinion of the Assistant Judge, he has not done. It follows, I think, that he fails affirmatively to prove the adoption. It is quite impossible for this Court to determine whether the adoption was valid or not. The plaintiff cannot prove that it was valid; the defendant cannot prove that it was invalid. Under the particular circumstances of this case, I do not think that there is any presumption to be raised for or against the adoption. It is a question of *onus* of proof.

The next question arises upon the terms of the deed, Exhibit A. It is whether, in the events which have happened, the plaintiff takes the property of Shankar Subaji under the deed. This is a question of construction The intention of Shankar must be gathered from the terms of the deed, and from the surrounding circumstances if there is room for doubt—*Fanindra Deb Raikat* v. *Rajeswar Dass*[6]. Here, apart from the character in which the gift was made to the plaintiff, it appears clearly that it was the inten-

(1) (1884) 7 All., 297.
(2) (1886) 8 All, 614.
(3) (1886) 11 Bom., 433.
(4) (1869) L R. 5 Ch., 139.
(5) (1875) 20 Eq, 136.
(6) (1885) 12 I. A., 72 at p 89.

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tion of the testator (the deed is, I think, in effect a will) that the plaintiff should take the whole estate in the event of Bala not returning. That cannot, I think, be doubted. Bala never has returned. The circumstances under which the testator desired that the plaintiff should become the owner of all his moveable and immoveable property have continued unaltered. It appears to me, therefore, that it lies upon the defendants to show that the testator was mistaken in his belief that his son Bala was dead and that he had adopted the plaintiff when he executed Exhibit A. The defendants say that the words of gift contained in the document—for they are, I think, words of gift—are inoperative because the testator had not validly adopted the plaintiff and only supposed that he had done so, but admittedly they cannot prove anything of the sort. In all probability the child Bala was dead when the document was executed. In the Privy Council case above referred to, it was established that the adoption was invalid, but here nothing is established. So far as we know, the circumstances under which the old man executed the deed were exactly as he supposed them to be. I think that the plaintiff can claim the property under the terms of the deed executed in his favour.

To prevent misapprehension I should add that my judgment on this point is based upon the proposition that where a deed of gift or will confers an estate upon a named person because he fills, or by reason of his filling, a certain character, he is entitled to recover the estate without affirmatively proving that he fills such character. The *onus* of proving that he does not fill the character which is the reason of the gift, lies, in my opinion, upon those who dispute his claim. The whole question is, in my opinion, one of *onus* of proof. I have not found any direct authority sanctioning the above view. It is, I think, supported by the judgments in *In re Corbishley's Trusts*[1]. It may be that, if the defendants could show that the plaintiff was not the adopted son of Shankar, they ought to succeed.

The defendants, however, contend that as the property was ancestral, Shankar had no power to deal with it to the detriment of his son Bala. It is somewhat difficult to see how this objec-

(1) (1880) 14 Ch. D., 846.

tion is open to them. They profess to make it as the heirs or some of the heirs of Bala, but they are, for the reasons already assigned, unable to prove that they are the heirs of Bala or that Shankar was not his heir. In this respect the case somewhat closely resembles that of *In re Green's Settlement* [1]. If they cannot prove that they are the heirs of Bala, the objection can only be made by them as reversioners after the death of Bhagubai entitled to the estate of Shankar or as persons in possession without title. In the former capacity they clearly cannot take the exception. In so far as they are concerned, Shankar could dispose of his property as he chose. I also think that as trespassers it is not competent for them to say that Shankar's conveyance is invalid. If Bala had survived and objected to it, doubtless he could have avoided it, but until avoided the settlement of the property by Shankar upon the plaintiff appears to me to confer title upon the latter.

I have, it will be observed, rested my decision to some extent upon English precedents. I have done so, not because they are binding as authorities, but because they appear to me to be founded on reason.

The plaintiff appears to me in all human probability to be the person legally entitled to the property of Shankar under what may be fairly termed his will. There is no rule of law, that I am aware of, which compels me to decide this appeal contrary to the probabilities of the case, or to defeat the clearly expressed wishes of Shankar Subaji. I would, therefore, reverse the decree of the Assistant Judge and restore that of the Subordinate Judge with costs throughout on the respondents.

CANDY, J.:—It is clear that plaintiff can only recover as the validly adopted son of Shankar, or as donee from Shankar by the deed A. With regard to the adoption it is a condition precedent that Shankar should have been without issue at the time of the adoption—Mayne, Section 97. The *onus* is on plaintiff, who before he can succeed must establish his title. It is for him to show when Bala died. It may be presumed that Bala is dead. But there is no presumption that Bala was dead in 1878.

(1) (1865) 1 Eq., 288.

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Therefore, in the absence of any evidence on the point, it is impossible to say when Bala died, and so it is impossible for plaintiff to prove that his adoption was valid.

Next, as to plaintiff's title as donee. The Assistant Judge, F. P., found as a fact that Shankar intended to give the estate to plaintiff as his adopted son capable of inheriting by virtue of his adoption. This is a finding of fact and binding on us—*Dyami Naik* v. *Lingappa*[1]. The question then arises whether the adoption was invalid. If it was, then the deed of gift had no effect on the property—*Fanindra Deb Raikat* v. *Rajeswar Das*[2]. Here the *onus* is on defendants. They must show that Bala was alive at the time of the adoption. Sections 107, 108 of the Evidence Act relate to the question whether a man *is* alive or dead. On this point there is in the present case no doubt. Bala has never been heard of since his disappearance in 1877: therefore the burden of proving that he is alive is shifted to the person who affirms it. That burden admittedly is not discharged. But the question here is whether Bala is proved to have been alive in 1878. Mr. Field in his notes to sections 107, 108 of the Evidence Act quotes Taylor, section 157, showing that though death is to be presumed after a certain interval, there is no presumption as to the time of death, and, therefore, if any one has to establish the precise period during these seven years at which the person died, he must do so by evidence, and can neither rely on the one hand upon the presumption of death, nor on the other upon the presumption of the continuance of life.

This is really what was ruled in *In re Phene's Trusts*[3], which laid down that, if a person has not been heard of for seven years, there is a presumption of law that he is dead, but at what time within that period he died is not a matter of presumption, but of evidence, and the *onus* of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. There is no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that

(1) P. J., for 1889, p. 37. (2) (1884) 11 Cal., 453.
(3) (1869) L. R. 5 Ch., 139.

a person alive and in health on a certain day was alive a short time afterwards.

In my opinion, sections 107, 108 of the Evidence Act have made no difference in this statement of the law. In the present case if it were possible to draw an inference of fact, I should say that the little boy Bala, aged eight years, who ran away from home in 1877 must in all probability have died before September, 1878. There is no presumption in law that because he was alive in 1877, therefore he was alive in 1878. In this view of the case, defendants cannot, in my opinion, successfully contest plaintiff's claim under the document A; and plaintiff, therefore, is entitled to have the decree of the Assistant Judge reversed and that of the Subordinate Judge restored.

Decree reversed.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

FAKIRGAUDA (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGI (ORIGINAL DEFENDANT), RESPONDENT.*

1898 April 22.

Husband and wife—Suit for possession of wife—Wife herself defendant—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 35—Restitution of conjugal rights—Demand and refusal—Continuing cause of action—Limitation Act (XV of 1877), Sec. 23.

Where a husband sued to recover possession of his wife, making the wife herself the defendant to the suit,

Held, it was in substance a suit for the restitution of conjugal rights, and article 35 of the Limitation Act (XV of 1877) applied.

The demand and refusal, which form the starting point for limitation under article 35, are a demand by the husband and refusal by the wife (or *vice versâ*) being of full age.

A positive refusal on the part of the wife to return to her husband is not essential to the husband's cause of action.

Quære—Whether in case of a refusal by a wife of full age to a demand made by her husband, that she should return to him, a suit by him for her recovery is barred under article 35 of Schedule II of the Limitation Act (XV of 1877), or falls within the purview of section 23 as based on a continuing cause of action?

* Second Appeal, No 950 of 1897.

1898.

PA KIRGAUDA v. GANGI.

SECOND appeal from the decision of L. Crump, District Judge of Dhárwár (confirming the decree of Ráo Bahádur Gangádhar V. Limaye, First Class Subordinate Judge).

Suit by a husband to recover possession of his wife. The defendant was the wife herself. The parties were Lingáyats and resided in Dhárwár.

The defendant contended that she and the plaintiff belonged to different sects of the Lingáyat caste, and that there could be no lawful marriage between them.

The Subordinate Judge found that the defendant was not the lawfully married wife of the plaintiff, the parties belonging to the different sects of the Lingáyat caste, and there being no evidence of any custom sanctioning such marriages He also held that the claim was time-barred under articles 34 and 35, Schedule II of the Limitation Act (XV of 1877).

The plaintiff appealed, but the Judge (T. Hamilton) summarily dismissed the appeal under section 551 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff preferred a second appeal, and the High Court reversed the decree and remanded the case. See I. L. R., 22 Bom., 277.

On the remand the Judge found that the suit was barred by limitation, and he confirmed the decree of the Subordinate Judge.

The plaintiff preferred a second appeal.

Dhondu P. Kirloskar appeared for the appellant (plaintiff):—The suit is not barred. The Judge applied article 34, Schedule II, of the Limitation Act. We submit that neither article 34 nor article 35 are applicable. This is not a suit for the restitution of conjugal rights; it is a suit for the institution of such rights. Article 34 applies to a suit for the recovery of a wife who is in the possession of a third person.

If the Limitation Act applies to such a case as this, section 23 of the Act applies, the case being one of continuing wrong—*Hemchand* v. *Shiv*[1]; *Bai Suri* v. *Sankla Hirachand*[2]; *Binda* v. *Kaunsilia*[3].

(1) P. J., 1883, p. 124 (2) (1892) 16 Bom., 714.
(3) (1890) 13 All, 126.

The defendant relied on the defence of limitation. The burden, therefore, lay on her to prove that there was no demand and refusal within two years of the institution of the suit.

Sadashiv R. Bakhle appeared for the respondent (defendant) — Both the lower Courts have held that there was no demand and refusal. Therefore, the suit was rather premature than time-barred. In our written statement there is an allegation that there was repudiation on our part immediately after the marriage.

Next we contend that the suit is governed either by article 34 or article 35 of the Limitation Act, and it was incumbent upon the plaintiff to prove demand and refusal within two years of the suit. For the purpose of the Limitation Act no distinction can be drawn between a suit for restitution of conjugal rights and one for institution of such rights. As to the general right of a Hindu to claim back his wife, we submit that the right can only be exercised after demand and refusal. Having regard to article 35 we contend that the suit is premature, there having been no demand and refusal and consequently there was no cause of action. The plaintiff may make a fresh demand and institute a fresh suit.

PER CURIAM:—We are unable to agree with the District Judge in this case that the suit is barred by limitation. It is a suit by the plaintiff, who alleges that he is the husband of the defendant, in which he seeks to recover possession of his wife, the defendant herself. It is a peculiar mode of stating the relief to which, if his allegations are true, the plaintiff would be entitled. The woman could not well be ordered to give possession of herself to the plaintiff. That is the appropriate remedy when the defendant is a third party who has the wife under his control. The appropriate form of decree in this case would be one which after making a proper declaration directs the defendant to go to the plaintiff's house—*Furzund Hossein* v. *Jaun Bibee*[1].

The suit is, however, we think, in substance a suit for the restitution of conjugal rights, and article 35 of the schedule to

(1) (1878) 4 Cal., 588.

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the Limitation Act is the article which is appropriate to it. The District Judge has held that the suit is barred, because the defendant and some of her witnesses have deposed to a demand and refusal six or seven years ago, but the demand and refusal to which they refer took place when the defendant was a minor of the age of fifteen or sixteen years. The demand and refusal, which form the starting point for limitation under article 35, are a demand by the husband and refusal by the wife (or *vice versâ*) being of full age. A refusal by the wife when a minor does not cause the statute to commence to run. That being so, the demand and refusal deposed to on behalf of the defendant must be eliminated from consideration for the purposes of limitation. The defendant appears to have attained majority about two years before the suit. She was about 21 when she gave her evidence in November, 1894. The suit was first filed on the 9th August, 1893. It is, therefore, clearly not time-barred.

Before us it is contended that the suit is premature, as no demand and refusal have been proved. No cause of action, therefore, it is said, has accrued to the plaintiff. The English Courts in suits of this kind require that there shall be a demand by the husband upon the wife to return to cohabitation before a petition is presented for restitution of conjugal rights. That is under a rule of Court (Rule 175): see Browne and Powles on Divorce, p. 135. There is no such rule of Court here, but the Limitation Act appears to recognize the necessity of a husband asking his wife to join him, or to return to his house before he can file a suit to compel her to do so. Assuming that to be the law, there is evidence here, which apparently the District Judge does not disbelieve, that the plaintiff called on the defendant to return to him two years before the witness, (Exhibit 31), gave his evidence, which would be about a year before suit. A positive refusal on the part of the wife cannot be essential to the husband's cause of action. She might always return evasive answers to his demands or silently ignore them. Here there is no doubt as to the position taken up by the defendant. She has always alleged, and still alleges, that the plaintiff's marriage with her is invalid and that she is not his wife, and she refuses, therefore, to live with him. We cannot doubt that this state of

affairs discloses a cause of action—*Dadaji* v. *Rukmabai*(1); *Binda* v. *Kaunsilia*(2); *Bai Sari* v. *Sankla Hirachand*(3).

We do not wish to express an opinion as to whether, if the defendant had been of full age when the demand and refusal deposed to by the defendant's witnesses took place, a suit by the plaintiff would have been absolutely barred, nor as to whether section 23 of the Limitation Act applies to such a case as this. The question, apart from the authorities, appears to us to be one of doubt and difficulty.

Decree reversed and appeal remanded for retrial. Costs, costs in the cause.

Decree reversed and case remanded.

(1) (1886) 10 Bom., 301. (2) (1890) 13 All., 126
(3) (1892) 16 Bom., 714.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

RAJARAM (ORIGINAL PLAINTIFF), APPLICANT, *v.* BANAJI MAIRAL (ORIGINAL DEFENDANT), RESPONDENT.*

1898. *June* 20.

Limitation Act (XV of 1877), Art. 179, Cl. 4—Step in aid of execution—Application for return of a copy of a decree.

An application to the Court by a decree-holder asking for the return of the copy of a decree filed with a former darkhast is not a step in aid of execution within the meaning of article 179 (4) of the Limitation Act (XV of 1877).

SECOND appeal from the decision of C. H. Jopp, District Judge of Poona.

Plaintiff and defendant were owners of two adjoining houses. On the 20th June, 1892, the plaintiff obtained a decree directing the defendant to remove certain work which he had done upon the plaintiff's wall, and restraining him from doing any new work thereon, or causing any obstruction to the plaintiff in repairing the wall.

On the 20th January, 1894, the plaintiff presented his first darkhást for execution of the decree. Notice under section 248

* Second Appeal, No. 72 of 1898.

1898.

RAJARAM v. BANAJI MAIRAL.

of the Civil Procedure Code was issued and made returnable on the 8th March, 1894. The plaintiff, however, failed to attend, and his darkhást was dismissed on the 3rd April, 1894.

On the 10th April, 1894, plaintiff applied to the Court for a return of the copy of the decree which had been filed with his darkhást.

On the 23rd February, 1897, plaintiff filed a second darkhást for execution. He contended that his application of the 10th April, 1894, for a return of the copy of the decree was a step in aid of execution and prevented the bar of limitation.

This contention was overruled by the Court of first instance, and the darkhást was rejected as barred by limitation.

This order was upheld, on appeal, by the District Judge.

Plaintiff thereupon preferred a second appeal to the High Court.

M. V. Bhat for appellant.

N. G. Chandavarkar for respondent.

The following authorities were cited in argument:—*Kunhi Mannan* v. *Seshagiri Bhakthan*(1); *Choudhry Paroosh Ram* v. *Kali Puddo*(2): *Rajkumar Banerji* v. *Rajlakhi Dabi*(3); *Gopilandhu* v. *Domburu*(4); *Aghore Kali Debi* v. *Prosunno Coomar*(5); *Chundra Nath* v. *Guiroo Prosunno*(6); *Krishnayyar* v. *Venkayyar*(7).

PARSONS, J.:—The point is whether the action of the decree-holder asking the Court for the return of the copy of the decree filed with a former darkhást is applying to the Court to take some step in aid of execution of the decree within the terms of article 179 (4) of the Limitation Act. In my opinion it is not. The words of the enactment seem clear. They require an application to be made to the Court for it to take some step in aid of execution of the decree. The return by it of a copy of a document cannot, in my opinion, be held to be a step in execution taken by the Court. If the copy were a necessary adjunct to an application for the execution of his decree, it would be, at the

(1) (1882) 5 Mad., 141.
(2) (1889) 17 Cal., 53.
(3) (1885) 12 Cal., 441.
(4) (1888) 11 Mad., 336.
(5) (1895) 22 Cal., 827.
(6) (1895) 22 Cal., 375.
(7) (1882) 6 Mad., 81.

most, an act which would enable the applicant to make that application in the future. He is not, however, required by law, when he presents his application to execute the decree, to file along with it a copy of the decree. This is provided by rule only. No doubt when he presents his application he is bound to present it in the manner required by the rules of the Court, but it seems to me that he would not be entitled to treat an application to the Court to obtain something which would enable him merely to comply with the rules as an application to the Court itself to take a step in aid of execution. For instance, to take a somewhat analogous case, assuming that the Court supplied the paper on which, under the rules, applications were to be made, I do not think that an application for the paper on which the application for execution was to be written would be entitled to be called an application to the Court to take a step in aid of execution. This is the principle of the decision in *Gopilandhu* v. *Domburu*[1] and in *Aghore Kali Debi* v. *Prosunno Coomar*[2] and is, in my opinion, a perfectly correct one. The decree is confirmed with costs.

RANADE, J.:—The appellant in this case obtained a decree on 21st June, 1869, in the First Class Subordinate Judge's Court, Poona, which was finally confirmed in second appeal on 20th June, 1892. The decree directed certain works to be removed, and the respondent was restrained from doing any new work in the wall or obstruct appellant in repairing his wall on respondent's side. The first darkhást for the execution of this decree was given on 20th January, 1891. Notice under section 248 was issued and made returnable on 8th March, 1894, when respondent obtained a postponement till 3rd April, 1894. On that day, appellant failed to attend, and the darkhást was dismissed for his default. On the 10th April, 1894, appellant applied for a return of the copies of the decrees filed with his first darkhást, and he gave his present darkhást on 23rd February, 1897, filing the copies of the decrees returned to him. In this darkhást the appellant stated, that though more than three years had elapsed since the presentation of the first darkhást, yet the second darkhást was within time by reason of the notice under section

(1) (1888) 11 Mad., 336. (2) (1895) 22 Cal., 827.

1898.

RATARAM v. BANAJI MAIBAL.

248, and the application made by respondent on the 8th March, 1894, as also by the order of 3rd April, 1894. In both the lower Courts, as also before us, the appellant did not rest his case on either the proceedings of the 8th March or 3rd April, 1894, but it was contended that the application of 10th April, 1894, for a return of the copies of the decrees prevented the bar of limitation. Both the Courts below overruled this contention, and held that the darkhást was time-barred. We have now to consider how far the application of 10th April, 1894, can be considered as a step in aid of execution within the meaning of clause 4 of article 179 of the Limitation Act.

The point has never been formally raised and decided in this Court. The Madras High Court has, however, ruled in *Gopilandhu* v. *Dombura*[1] that an application by a decree-holder for a copy of the decree with intent to apply for execution is not a step in aid of execution within the meaning of article 179, clause 4. Two decisions of the Calcutta High Court to the same effect are reported in *Ganga Pershad* v. *Debi Sundari*[2], as also in *Rajkumar Banerji* v. *Rajlakhi Dabi*[3]. The appellant's pleader, however, urged that the Madras ruling did not apply because the ground on which it was based was that, under the provisions of the Code, it is not absolutely necessary to file copies of the decrees with a darkhást. He contended that the rules framed by this Court required the production of such copies, and that, therefore, the ruling is inoperative here. We do not think that there is any difference in the rules framed by this Court and those to which the Madras High Court refers in its judgment, and the ruling, therefore, is one which applies to the present case. If applications for copies of decrees were held to be steps in aid of execution, the starting points laid down in the first three clauses of article 179 would be enlarged, and an element of uncertainty introduced which would defeat the purpose of the law. As regards the Calcutta decision in *Ganga Pershad* v. *Debi Sundari*[4] it was argued that the decision would have been otherwise if the lady who applied for the copy had got her name entered as heir in the record in the place of the deceased judgment-creditor. This circumstance,

(1) (1888) 11 Mad., 336.
(2) (1885) 11 Cal., 227.
(3) (1885) 12 Cal., 441.
(4) (1885) 11 Cal., 227.

though it is referred to in the judgment of the Court, does not appear to us to be the sole or even the chief ground for the conclusion arrived at. These reasons are more fully set out in the judgment in *Rajkumar Banerji* v. *Rajlakhi Dabi*[1]. "An application for the return of a document in the record room is by itself an indifferent act," and "no copy of the decree is required by law to be filed in execution." These reasons appear to us to be good and sufficient reasons for holding that the lower Courts were right in rejecting the darkhást in the present case.

The other cases cited by the appellant's pleader have no bearing on the merits of his present contention. The ruling in *Chundra Nath* v. *Gurroo Prosunno*[2] that an application for a transfer of decree to another Court is a step in aid of execution, as also the ruling in *Krishnayyar* v. *Venkayyar*[3] which held that an application to the second Court to return the decree back to the first Court when complete execution has not been obtained, was a step in aid of execution, have obviously no bearing in the present case. So also the decision in *Kunhi Mannan* v. *Seshagiri Bhakthan*[4], which held that an application for a certificate that a certain copy of a revenue register is necessary, stands on the same footing. The applications in all these cases had one common feature. They were applications made in furtherance of an application to put a decree in execution. In the present case the first darkhást had been dismissed on 3rd April, 1894. The application on 10th April was not an application in aid of any darkhást then pending, nor was it an application which was required by law as a necessary preliminary step. It was mainly on this account that the appellant in his present darkhást laid no stress on this application of 10th April, but chiefly relied on the proceedings of 8th March and 3rd April, 1894. The Courts below have very properly disallowed his contention based on the application for a return of the copies made after the darkhást was disposed of, and we accordingly confirm the order of the lower Court and reject the appeal.

(1) (1885) 12 Cal., 441.
(2) (1895) 22 Cal., 375.
(3) (1882) 6 Mad., 81.
(4) (1882) 5 Mad., 141.

APPELLATE CRIMINAL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1893.
June 28.

QUEEN-EMPRESS *v.* GANGIA AND OTHERS *

Criminal procedure—Judge's charge—Misdirection—Confessions—Retracted confessions—Admissibility of such confessions without corroborative evidence—Evidence.

The accused were tried for murder. The Sessions Judge in his charge to the jury discussed the evidence generally, describing it as very poor evidence which, standing alone, amounted to nothing. He also told the jury that, as regards retracted confessions, "the law is that you are to look for corroboration in independent evidence. If that supplies such corroboration that you can confidently say, 'the confessions must be absolutely true,' you can act upon them, otherwise not."

Held, that the charge was defective. The Sessions Judge ought to have summed up the evidence to the jury, calling their attention to the material parts of it, and leaving them to form their own opinion on it, instead of treating it generally.

Held, also, that the Judge had misdirected the jury, as there is no rule of law that a retracted confession cannot be treated as evidence unless it is corroborated in material particulars by independent reliable evidence.

APPEAL by the Local Government from an order of acquittal passed by F. C. O. Beaman, Sessions Judge of Belgaum.

The accused, who were eight in number, were tried on a charge of murder under section 302 of the Indian Penal Code (Act XLV of 1860).

In his charge to the jury the Sessions Judge said as follows:—

"The whole case turns on the confessions which have all been retracted For if you eliminate the confessions, what remains? This much only.

"*A.* General evidence of ill-will against the complainant. But this is common to the whole country side and in no sense particular to the accused or any of them.

"*B.* Very poor evidence of witness to conspiracy.

"*C.* Very poor evidence of one witness as to seeing some of the accused going together on the night of the murder.

"*D.* Production of a gun in presence of the panch by one of the accused.

"That evidence standing alone amounts practically to nothing.

* Criminal Appeal, No 122 of 1893.

"Thus it turns out that the case rests solely on retracted confessions. I cannot even direct you to independent corroboration of the kind there ought to be before you found a verdict on a retracted confession. The law is that you are to look for corroboration in the independent evidence. If that supplies such corroboration that you can confidently say, 'the confessions must be substantially true,' you can act upon them, otherwise not . . . . It is very unsafe to act upon an uncorroborated retracted confession."

THE jury by a unanimous verdict acquitted all the accused.

The Sessions Judge accepted this verdict and directed the accused to be acquitted and discharged.

Against this order of acquittal, the Local Government appealed to the High Court.

Ráo Bahádur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

Dattatrya K. Idgungi for the accused.

PARSONS, J:—The charge of the Sessions Judge to the jury in this case has been attacked on many grounds, but it is sufficient for us to notice two of them only. First, that the Sessions Judge did not sum up the evidence to the jury calling their attention to the material facts of it and leaving them to form their own opinion upon it, but treated it generally and called it "very poor evidence," which, "standing alone, amounted to nothing." With reference to this, we would draw the attention of the Sessions Judge to the judgment of Sargent, J., in *Reg.* v. *Futtechund*[1]. Secondly, that he misdirected the jury by telling them that in the case of retracted confessions "the law is that you are to look for corroboration in the independent evidence. If that supplies such corroboration that you can confidently say 'the confessions must be absolutely true,' you can act upon them, otherwise not." We think this is a clear misdirection. This Court has always consistently held that there is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars—*Queen-Empress* v. *Ghariá*[2]. The Madras High Court in a recent case, *Queen-Empress* v. *Raman*[3], has arrived at the same conclusion. In

(1) (1868) 5 Bom. H. C. Rep., 85, Cr. C.
(2) (1894) 19 Bom., 728.
(3) (1897) 21 Mad., 83.

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that case the Chief Justice and Shepherd, J., say: "We are of opinion that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence." We would also refer the Sessions Judge to the Criminal Rulings of this Court, 12 of 1896 (*Imp.* v. *Genu*) and 3 of 1898 (*Imp.* v. *Baly*), especially the latter one, where the subject of confessions is dealt with, and the case of *Queen-Empress* v. *Maiku Lal* [1].

We reverse the acquittals of the accused and direct them to be retried.

(1) (1897) 20 All. 133.

APPELLATE CIVIL.

Before the Honourable Mr. Parsons, (Acting) Chief Justice, and Mr. Justice Ranade.

1898. *July* 6.

SATU AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* HANMANT-RAO GOPALRAV NIMBALKAR (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), *Sec.* 120—*Refusal of a plaintiff to attend as a witness.*

A plaintiff who was represented by a pleader was summoned at the instance of a defendant to attend the Court and to give evidence on his behalf on the day fixed for final hearing. The plaintiff refused to attend on the ground that he was a person of rank and was exempted from personal appearance in the Courts of a Native State. The first Court, considering the personal appearance of the plaintiff necessary, issued an order under section 120(1) of the Civil Procedure Code (Act XIV of 1882) that he should attend, and, on his failure to do so, passed

*Appeals No. 37 and 39 of 1897 from order.

(1) Section 120, Civil Procedure Code (Act XIV of 1882):—

"If the pleader of any party who appears by a pleader refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

"If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pass a decree against him, or make such order in relation to the suit as it thinks fit."

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a decree against him. On appeal, the Judge reversed the decree and remanded the case for trial.

Held, confirming the order of remand, that the order and decree of the first Court were alike illegal, as the plaintiff having appeared by a pleader, the Court had no power to issue an order under section 120, unless the pleader had refused or was unable to answer a material question.

APPEAL against an order passed by F. C. O. Beaman, District Judge of Belgaum.

One Hanmantrao Gopalrav Nimbalkar, a resident of Kolhápur, brought a suit in the Court of the Subordinate Judge of Chikodi to recover rent due under a kabuláyat. The defendants denied their liability.

After the issues had been framed, the plaintiff was served with a summons as witness for the defence to appear and give evidence, but he refused to comply with it, on the ground that he was a person of rank and exempt from personal appearance in the Courts of the Mahárája of Kolhápur. The Subordinate Judge being of opinion that the questions which the defendants proposed to ask the plaintiff were of such a nature that the latter should appear before him to answer them in person, issued a notice under section 120 of the Civil Procedure Code (Act XIV of 1882) requiring the plaintiff to appear in person on a certain day and informing him that the suit would be dismissed if he failed to appear. The notice was duly served, but the plaintiff did not attend, the reason assigned being that he was a person of rank who enjoyed the privilege of exemption from personal attendance in the Kolhápur Courts. Upon this, the Subordinate Judge dismissed the suit, observing that though the plaintiff was exempted from appearance from the Kolhápur Courts, he did not enjoy the same privilege with respect to the British Courts.

The plaintiff appealed and contended that section 120 did not apply, inasmuch as his pleader did not refuse, nor was he unable to answer any material questions relating to the suit. The Judge reversed the decree and remanded the case for re-trial. The following is an extract from his judgment :—

"The learned Judge below was in error in dismissing the suit under section 120, Civil Procedure Code. Neither does section 157 apply. The first of those sections

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provides for the appearance of a party not to give evidence, but to put the Court in possession of information necessary to the framing of issues or other points in the conduct of the suit. The second of those sections provides for the case of a party who is in the eye of the law altogether absent. Here the plaintiff was represented by a pleader. The plaintiff was summoned, like any other witness, to give evidence."

The defendants appealed against the order of remand.

Balaji A. Bhagavat and *Mahadeo V. Bhat* for the appellants (defendants).

Vasudev G. Bhankarkar for the respondent (plaintiff).

PARSONS, C. J. (Acting):—As the plaintiff appeared by a pleader, the Court had no power to issue an order under section 120 of the Civil Procedure Code, unless his pleader refused or was unable to answer a material question. No such refusal or inability is noted on the record. What appears therefrom is that issues were settled on the 5th March and that the plaintiff was summoned at the instance of the defendant to attend the Court and give evidence on his behalf on the 23rd September, the day fixed for final hearing, and that he failed to attend, and that the Court thereupon issued an order under section 120 that he should attend, and on his failure to attend passed a degree against him We think that the District Judge was right in holding that under these circumstances the order and the decree were alike illegal, and we dismiss these appeals with costs in each on the appellant.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

LAKSHMAN BALAJI (ORIGINAL DEFENDANT), APPLICANT, *v.* RAMCHANDRA PARASHRAM (ORIGINAL PLAINTIFF), OPPONENT.*

1898. *July* 11.

Dekkhan Agriculturists' Relief Act (XVII of 1879), *Secs.* 3 (*z*), 53 *and* 73(1)*—Agriculturist—Plaintiff proved or admitted to be an agriculturist—Appeal—Special Judge—Jurisdiction.*

The plaintiff alleging that she was an agriculturist sued for redemption under Chapter II of the Dekkhan Agriculturists' Relief Act (XVII 1879). The Subordinate Judge raised an issue as to her status, and on that issue found that she was not an agriculturist. He, however, proceeded with the trial of the case and on the merits dismissed her claim. She thereupon applied to the Special Judge, who took up the case in revision, reversed the decree of the lower Court, and passed a decree in the plaintiff's favour, holding that she was an agriculturist.

Held, that the Special Judge had no jurisdiction. The Subordinate Judge had found that the plaintiff was not an agriculturist. Having done so it must be deemed that he went on with the trial only in his ordinary jurisdiction, and the decree passed was one not under Chapter II of the Dekkhan Agriculturists' Relief Act, but under the general provisions of the Civil Procedure Code (Act XIV of 1882). By section 53 the Special Judge has jurisdiction only over decisions and orders passed by a Subordinate Judge under Chapter II.

* Application No. 18 of 1898 under extraordinary jurisdiction.

(1) Sections 3 (*z*), 53 and 73 of the Dekkhan Agriculturists' Relief Act:—

3. The provisions of this chapter (II) shall apply to—

(*z*) Suits for the redemption of mortgaged property when the plaintiff, or, where there are several plaintiffs, any one of the plaintiffs, is an agriculturist.

53. The District Judge may for the purpose of satisfying himself of the legality or propriety of any decree or order passed by a Subordinate Judge in any suit or other matter under Chapter II, Chapter IV or Chapter VI of this Act, and as to the regularity of proceedings therein, call for and examine the record of such suit or matter, and pass such decree or order thereon as he thinks fit;

and any Assistant Judge or Subordinate Judge appointed by the Local Government under section 52 may similarly, in any district for which he is appointed, call for and examine the record of any such suit or matter, and, if he see cause therefor, may refer the same, with his remarks thereon, to the District Judge, and the District Judge may pass such decree or order on the case as he thinks fit:

Provided that no decree or order shall be reversed or altered for any error or defect or otherwise, unless a failure of justice appears to have taken place.

73. The decision of any Court of first instance that any person is or is not an agriculturist, shall for the purposes of this Act, be final.

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LAKSHMAN v. RAM-CHANDRA.

Per PARSONS, J. —It is only when the plaintiff is admitted and proved (not merely when he claims) to be an agriculturist that the Court has jurisdiction to try a suit under Chapter II of the Act The question of status ought to be raised and decided as a preliminary issue.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Khán Bahádur Navroji Dorabji, Special Judge under the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The plaintiff sued to redeem and recover possession of certain land, alleging that she was an agriculturist, and thus entitled to the benefit of Chapter II of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The defendants denied the mortgage and contended (*inter alia*) that the plaintiff was not an agriculturist, and that the suit was barred by limitation.

The Subordinate Judge found that the plaintiff was not an agriculturist, and having done so he held, on the merits, that the plaintiff was not the owner of the equity of redemption and that the suit was barred. He, therefore, dismissed the suit.

The plaintiff applied for revision to the Special Judge, who reversed the decree and ordered that plaintiff should redeem and recover possession of the property on payment of ninety-nine rupees to the defendants within six months. In his judgment he stated that the plaintiff 'must certainly be taken to be an agriculturist."

Against this order defendant No. 3 applied to the High Court in its extraordinary jurisdiction to set aside the decree of the Special Judge, contending that he had no jurisdiction in the case and that the plaintiff having been held by the first Court not to be an agriculturist, the provisions of Chapter II of the Dekkhan Agriculturists' Relief Act were not applicable. A rule *nisi* was granted and now came on for hearing.

Mahadeo B. Chaubal appeared for the applicant (defendant No. 3) in support of the rule:—The question is whether the Special Judge had jurisdiction in the matter. We contend that he had not. For the Subordinate Judge had found that the

plaintiff was not an agriculturist. Having done so, it must be taken that he decided the suit in his ordinary jurisdiction and not in the special jurisdiction vested in him under Chapter II of the Dekkhan Agriculturists' Relief Act. If he had held that the plaintiff was an agriculturist, and had decided the suit under Chapter II, then, no doubt, the Special Judge would have had jurisdiction to entertain the application for revision. Under the circumstances the plaintiff's remedy lay in appeal to the District Judge.

Balaji A. Bhagavat for the opponent (plaintiff) showed cause :— The Special Judge had jurisdiction to entertain our application for revision. In the plaint, the plaintiff clearly stated that she was an agriculturist. The Special Judge was justified in stating that the plaintiff was an agriculturist : she held land and maintained herself by agriculture. The decision of the first Court under the original Act (XVII of 1879) as to status was final, but under the amending Act (VI of 1895) the finding can be upset in appeal. As to the powers of the Special Judge see section 53.

PARSONS, J. :—In this case the plaintiff brought a suit for redemption under the provisions of Chapter II of the Dekkhan Agriculturists' Relief Act, alleging that she was an agriculturist entitled to the benefits of that Act. The defendant in his written statement disputed her status and, an issue being framed on the point, the Subordinate Judge decided that the plaintiff was not an agriculturist and could not avail herself of the Dekkhan Agriculturists' Relief Act. The Subordinate Judge, however, did not dispose of the case as he should have on this issue only, but he decided the other issues raised, and finding that plaintiff was not the owner of the equity of redemption and that her suit was time-barred, rejected the claim. The Special Judge took up the case on revision under section 53 of the Act, and passed a decree in favour of the plaintiff.

It is contended that the Special Judge had no jurisdiction, since the decree passed by the Subordinate Judge was not passed in a suit under Chapter II of the Act. I think the contention is a good one. Section 3 (*z*) of the Act has the words "when the plaintiff is an agriculturist." It is thus, not when the

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plaintiff claims to be an agriculturist, but when he is an agriculturist, that is to say, when he is admitted or proved to be an agriculturist, that the Court is given jurisdiction to entertain and try a suit under Chapter II of the Act. Directly the Court finds that he is not an agriculturist, (and this point, if at issue, ought to be raised and decided as a preliminary one), the Court has no jurisdiction to proceed under that chapter. If, as in the present case, the Court, after finding that the plaintiff is not an agriculturist, goes on with the trial of the suit, it must be deemed to do so only under its ordinary jurisdiction, and the decree passed would not be one passed under Chapter II of the Act, and, therefore, final, but would be appealable under the general provisions of the Civil Procedure Code. The Special Judge is, by section 53, given jurisdiction only over decrees or orders passed by a Subordinate Judge in a suit or matter under Chapter II.

If what I have above said is correct, it clearly cannot be said that a decree is passed in a suit under Chapter II when the Subordinate Judge has found in that suit that the plaintiff is not an agriculturist and is not entitled to bring a suit under that chapter. I think in these cases that the suit is governed, not by the description that the plaintiff gives of his status, but by his actual status as determined by the Court in which his suit is filed, and that the jurisdiction of the Special Judge to hear an application for revision of the decree or order passed in the suit must depend upon the same determination.

We make the rule absolute with costs. The application to the Special Judge is ordered to be returned to the applicant.

RANADE, J.:—The question of jurisdiction raised by the applicant in this case is one of some importance. It is not disputed that before the repeal of section 73 of Act XVII of 1879 by section 3 of Act VI of 1895, the decision of the question of status by a Court of first instance was final. The consequences of this finality are discussed in *Malhar* v. *Chinto*[1], *Mahalingapa* v. *Nemchand*[2] and *Gyanmal* v. *Ramchandra*[3]. In the present case, the decision was that the respondent, original plaintiff, was

(1) P. J. for 1887, p. 38. (2) P. J. for 1887, p. 77.
(3) P. J. for 1896, p. 342.

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not an agriculturist. This decision being final, the case was taken out of the description of suits falling under Chapter II of Act XVII of 1879, and the Special Judge had no jurisdiction to exercise his revisional powers in respect of it.

It was, however, contended that, by reason of the repeal of section 73, the finality of such decisions on the point of status of the Court of first instance was removed, and the Special Judge could exercise his revisional powers in all cases where he was satisfied that the decision of the question of status was incorrect, and that the mortgagor seeking redemption was an agriculturist. It is not, however, easy to see how the repeal of section 73 could confer a new jurisdiction on the Special Judge which he did not possess before. His jurisdiction in the matter of such suits is regulated by the provisions of section 3, clause (*b*), sub-clause (*z*), which the amending Act has left untouched. That clause gives him jurisdiction in cases when the mortgagor seeking redemption is an agriculturist, and the claim is valued at a certain figure and the property is situated within certain districts. These limitations must be strictly observed. The only effect of the repeal of section 73 is that, in cases where he has jurisdiction, he is not bound by the decision of the Court of first instance when it finds that the person seeking redemption is an agriculturist. If the Special Judge finds that this decision is not correct, he may revise it, and if he finds that the plaintiff is not an agriculturist, he must refer the applicant before him to the District Court. In the same manner, if the District Judge finds in an appeal before him that a certain person seeking redemption was an agriculturist, though held to be otherwise by the Court of first instance, he can, since the date of the repeal of section 73, reverse the decision of the Court below, and then return the appeal to be filed as an application before the Special Judge if the other limitations hold good in the particular case. This is the only change effected by the repeal. In the present case the decision of the Court of first instance that the respondent-plaintiff was not an agriculturist excluded the case from the description of suits falling under Chapter II, over which alone the Special Judge has jurisdiction. The only remedy open to the respondent-plaintiff was by way of appeal to the District Court.

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The decision in *Shidhu* v. *Bali*[1], followed in *Usmanbhai* v. *Imratabai*[2], no doubt recognizes the very large powers possessed by the Special Judge under the Dekkhan Agriculturists' Relief Act to interfere with decisions on questions of fact as well as of law, but this wide power cannot be held to cover cases where he acts without jurisdiction as in the case before us. The decision in *Kondaji* v. *Anau*[3] certainly went much further, but the ruling is expressly based on a *bonâ-fide* mistake of facts on the part of the first Court in applying Chapter II to a case which did not fall under it. The ruling has no application in the present case, as there is no allegation here of any such mistake. The same remark holds true of the ruling in *Bhagvant* v. *Rango*[4], where this Court held that when the first Court had disposed of the case as falling under Chapter II, the Special Judge's jurisdiction was not ousted by reason of his finding that the mortgage was for a larger sum than the limitation laid down in section 3. The circumstances of the present case do not quite resemble those of the ruling in *Janardhan* v. *Ananta*[5], where the effects of the repeal of section 73 are discussed in respect of the jurisdiction of District Judges, but the principle laid down there holds equally good in respect of the Special Judge. Just as the District Judge has no power to hear an appeal in a case falling within Chapter II, but is bound to return the appeal to be filed as an application before the Special Judge, the Special Judge in this case had no power to dispose of the application before him in the present case, but was bound to refer the applicant to his remedy by way of appeal.

We must, therefore, make the rule absolute, and set aside the decision of the Special Judge, and direct the respondent to seek his remedy in the District Court.

Rule made absolute.

(1) (1896) 15 Bom., 180.
(2) P. J. for 1893, p. 148.
(3) (1883) 7 Bom., 118.
(4) P. J. for 1884, p. 30.
(5) P. J. for 1896, p. 396.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

PAYAPA AKKAPA PATEL (ORIGINAL PLAINTIFF), APPELLANT, *v.* APPANNA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1898. *July* 11.

Hindu law—Adoption—Adoption by widow of a predeceased son—Consent of mother-in-law—Adoption must be by widow of the last full owner—Exceptions to this rule.

By Hindu law as settled by judicial decisions, it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and a person in whom the estate does not vest, cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietary rights.

To this rule there are four exceptions —

1. In the case of co-widows. Though, on the death of the husband without male issue, the estate vests in all his widows, it has been held that the elder widow can, by adopting a son with the express or implied permission of her husband, divest the co-widow or widows of their vested rights The consent of such younger widows has not been held to be essential.

2 In the case of a mother who succeeds as heir to an unmarried son, legitimate or adopted, who dies after his father. In such a case the right of the widow to take a son in adoption to her husband has been conceded to her, though such a son cannot properly be described as being the heir of the last full owner.

3. When an adoption takes place with the full assent of the party in whom the estate has vested by inheritance, the adoption is validated by such consent.

4. Where there has been ratification by conduct or acquiescence.

Per PARSONS, J. .—The mere fact that the adopting widow is not the widow of the last male holder would not make an adoption by her spiritually invalid, while any difficulty as to the inheritance and the estate is cured by the assent to the adoption given by the person in whom that inheritance or estate is vested.

One Bhimappa died in 1878, leaving a widow Umava and a daughter-in-law Sarasvati him surviving His only son Dangavda, the husband of Sarasvati, had predeceased him. On Bhimappa's death his estate vested in his widow Umava. In 1879 Sarasvati with Umava's consent adopted a son Shentapa (defendant No. 3). The plaintiff in this suit sued to recover certain land which formed part of Bhimappa's estate, alleging that it had been given to him by Umava. The first defendant alleged and proved that he had bought the land from the third defendant (Shentapa), who was the adopted son of Sarasvati.

Held, (dismissing the suit), that the adoption was valid, and that the first defendant was entitled to the land.

* Second Appeal, No. 931 of 1897.

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THE plaintiff sued to recover possession of certain land from the first defendant, who had ousted him in 1891. The plaintiff alleged that the land had been given to him by Umava, the widow of one Bhimappa, the former owner of the land.

Umava had succeeded to the land on the death of her husband (Bhimappa) in 1878. She was then sixty years of age. Their only son Darigavda had predeceased Bhimappa and left a widow Sarasvati, who at Bhimappa's death was twenty years old.

For the defence it was alleged that Sarasvati, with the consent of Umava, had adopted a son named Shentapa (defendant No. 3) to her husband (Darigavda), and that he had sold the land to the first defendant, who was in possession.

The Subordinate Judge found that Sarasvati did as a matter of fact adopt the third defendant with the assent of her mother-in-law Umava, in whom Bhimappa's estate had vested on Bhimappa's death, and that such adoption was valid, and that the title of the first defendant as purchaser from the third defendant as such adopted son was established. He, therefore, dismissed the plaintiff's claim.

On appeal the Judge confirmed the decree.

The plaintiff appealed to the High Court. The only question raised in appeal was as to the validity of an adoption by a daughter-in-law in the life-time of her mother-in-law, the estate having vested in the latter as heir and not in the daughter-in-law, by reason of her husband having predeceased his father.

Dhondu P. Kirloskar, for the appellant (plaintiff) :—The only question is, whether the adoption of Shentapa (defendant No. 3) is valid. We contend that it is invalid. Umava was the widow of the last male holder, and, therefore, she alone was entitled to adopt. Her consent to the adoption by her daughter-in-law was not sufficient to make the adoption valid.

Manekshah J. Taleyarkhan, for the respondents (defendants) :—It is not necessary that the widow who adopts should be the widow of the last male holder. It has been held that when a son dies unmarried, or without leaving a widow, his mother can adopt. The test of a valid adoption, in a case like the present, is

whether the consent of the person in whom the estate has vested has been obtained. Here the mother-in-law, in whom the estate had vested, consented to the adoption by her daughter-in-law, and she having consented, the adoption was valid. It was not necessary to obtain the consent of the reversioners in whom the property had not vested.

The following cases were cited during arguments:—*Shri Dharnidhar* v. *Chinto*[1]; *Vasudeo* v. *Ramchandra*[2]; *Rupchand* v. *Rakhmabai*[3], *Babu* v. *Ratnoji*[4]; *Amava* v. *Mahadgauda*[5], *Pudma Coomari Debi* v. *The Court of Wards*[6], *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*[7], *Gavdappa* v. *Girimallappa*[8]; *Krishnarav* v. *Shankarrav*[9], *Bhoobum Moyee* v. *Ram Kishore*[10]; *Waman Dhondo* v. *Ramchandra*[11].

RANADE, J.:—Both the lower Courts have found that Sarasvati, the widow of the predeceased son of Bhimappa, did, as a matter of fact, adopt respondent No. 3 as her son with the full assent of her mother-in-law, Bhimappa's widow Umava, and that the adoption so made with the assent of the person in whom the estate vested on Bhimappa's death was a valid adoption. In the appeal before us the sole contention raised related to the validity of such an adoption by a daughter-in-law in the life-time of her mother-in-law when the estate was vested in the latter as heir, and not in the daughter-in-law by reason of her husband having predeceased his father.

There can be no doubt that, as a general rule of strict Hindu law as settled by judicial decisions, it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and that a person in whom the estate does not vest cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietary rights. This position was first laid down in *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore*[10], and has been

(1) (1895) 20 Bom., 250.
(2) (1896) 22 Bom., 551.
(3) (1871) 8 Bom. H. C Rep., A. C. J., 114.
(4) (1895) 21 Bom., 319.
(5) (1896) 22 Bom., 416.
(6) (1881) 8 I. App., 229.
(7) (1876) 4 I. App., 1.
(8) (1894) 19 Bom., 331.
(9) (1892) 17 Bom., 164.
(10) (1865) 10 Moore's I. App., 279.
(11) P. J., 1897, p. 183.

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repeatedly affirmed by their Lordships in *Pudma Coomari Debi* v. *The Court of Wards*[1], and again in *Thayammal* v. *Venkatarama*[2], and *Tarachurn* v. *Suresh Chunder*[3]. Effect was given to this view by the Madras High Court in *Annammah* v. *Mabbu Bali Reddy*[4], by the Calcutta High Court in *Tarachurn* v. *Suresh Chunder*[5] and by this Court in *Keshav* v. *Govind*[6]; *Chandra* v. *Gojarabai*[7]. In most of these cases the estate had vested in the daughter-in-law by reason of her husband having survived his father—*Mussumat Bhoobum Moyee Debia* v. *Ram Kishore*; *Thyammal* v. *Venkatarama*, *Tarachurn* v. *Suresh Chunder*, *Krishnarav* v. *Shankarrav*[8] and *Keshav* v. *Govind*, and it was held that the mother-in-law could not by exercising her power of adoption defeat her daughter-in-law's rights. The same principle governs cases when the son dies before his father, and it is the daughter-in-law who seeks by adoption to divest the mother-in-law of her rights—*Shri Dharnidhar* v. *Chinto*[9]. The same rule applies to the case of collateral relations—*Rupchand* v. *Rakhmabai*[10]; *Annammah* v. *Mabbu Bali Reddy*[4]; *Chandra* v. *Gojarabai*[7].

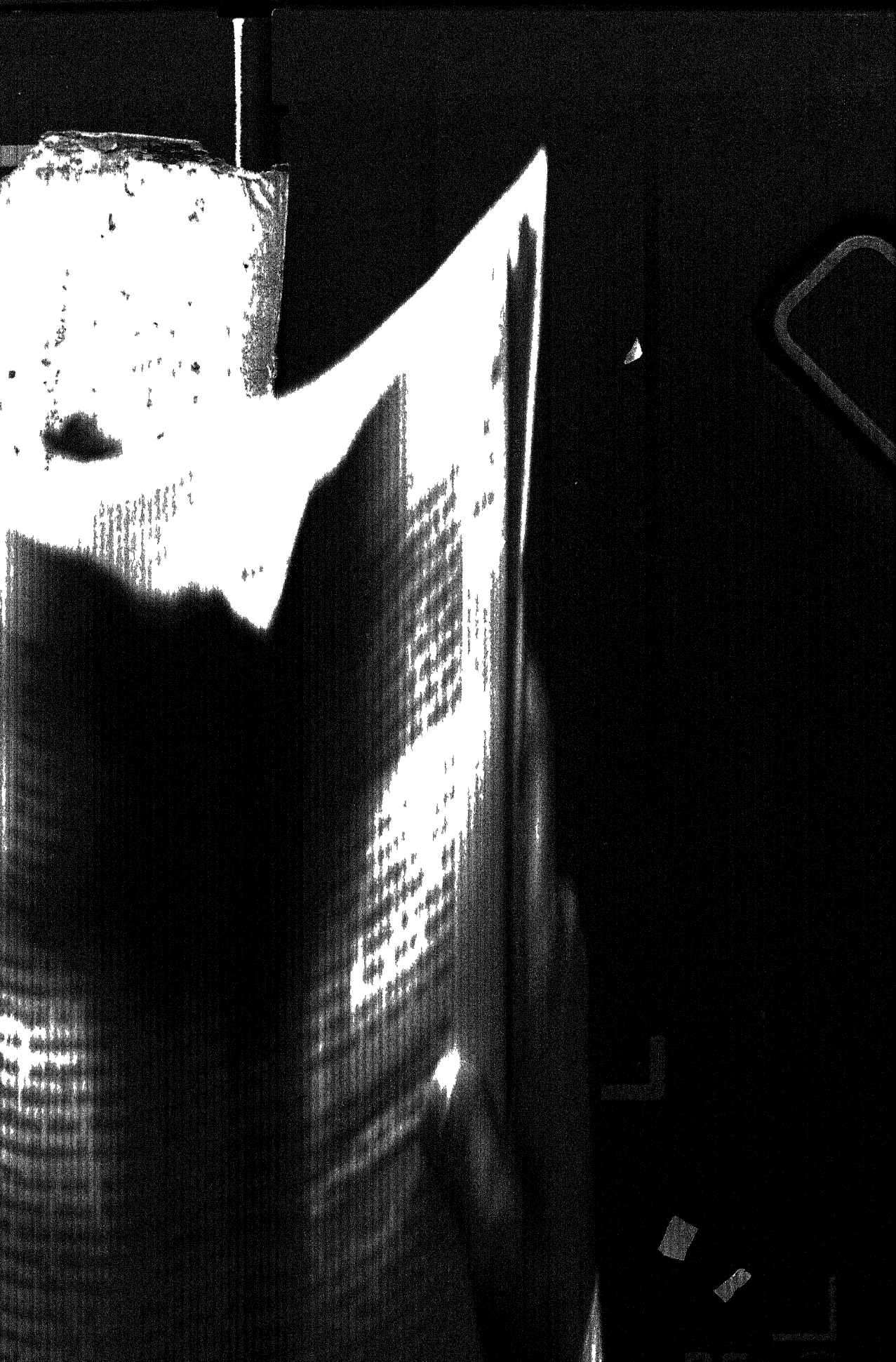
Although this is the general rule, four distinct classes of exceptions or qualifications to this rule have been recognized. The first exception has reference to the case of co-widows. Though on the death of the husband without male issue, the estate vests in all his widows, it has been held that the elder widow can, by adopting a son with the express or implied permission of her husband, divest the co-widow or widows of their vested rights. The consent of such younger widows has not been held to be essential—*Rakhmabai* v. *Radhabai*[11]; *Ramji* v. *Ghamau*[12]; *Amava* v. *Mahadgauda*[13]. In such cases the widows are apparently considered to be not distinct but united in their concern to respect the wishes and promote the interest of the husband, and the act of the same widow is held to bind the others.

(1) (1881) 8 I. A., 229.
(2) (1887) 14 I. A., 67.
(3) (1889) 16 I. A., 166.
(4) (1875) 8 Mad. H. C. Rep., 108.
(5) (1886) 17 Cal., 122.
(6) (1884) 9 Bom., 94.
(7) (1890) 14 Bom., 463.
(8) (1892) 17 Bom., 164.
(9) (1895) 20 Bom., 250.
(10) (1871) 8 Bom. H. C. Rep., 114.
(11) (1868) 5 Bom. H. C. Rep., 181.
(12) (1879) 6 Bom., 498.
(13) (1896) 22 Bom., 416.

The second exception to the rule that it is only the widow of the last full owner who can adopt a son to him on his death without issue, has been recognized in the case of a mother who succeeds as heir to an unmarried son, legitimate or adopted, who dies after his father. In such a case the right of the widow to take a son in adoption to her husband has been conceded to her, though such a son cannot properly be described as being the heir of the last full owner. This exception was approved by the Privy Council in *Rajah Velanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*[1], where the principle of such recognition is laid down, namely, that the act of adoption is derogatory of no other rights than those of the adopting mother. The judgment expressly states that this circumstance distinguished such a case from the general rule as laid down in *Mussumat Bhoobum Moyee* v. *Ram Kishore*[2] and that the decision in the latter case expressly recognized this distinction. This view was given effect to in *Ramji* v. *Ghamau*[3] and *Gavdappa* v. *Girimallappa*[4], *Sangapa* v. *Vyasapa*[5], in which last case the ruling in *Krishnarav* v. *Shankarrav*[6] was distinguished on the ground that the deceased's son last full owner had been married and had left a widow whose rights were defeated by the adoption, which of course brought the case under the general rule.

The third modification of the general rule is the one with which we are more immediately concerned here, though it is in reality only a further development of the principle on which the second exception is based. It is to the effect that when the adoption takes place with the full assent of the party in whom the estate has vested by inheritance, the adoption is validated by such consent. The validity of the principle of the general law is not affected by a qualification which recognizes that a person may waive his right in favour of the adoption. In the *Ramnad case*[7] their Lordships in their judgment observed that in the case of an adoption by a predeceased son's widow, the consent of the father-in-law, or, in his absence, of "all the brothers, who in default of

(1) (1876) 4 I. A., 1.
(2) (1865) 10 Moore's I. A., 279.
(3) (1879) 6 Bom., 498.
(4) (1894) 19 Bom., 331.
(5) P. J. for 1896, p. 528.
(6) (1892) 17 Bom., 164.
(7) (1868) 12 Moore's I. A., 397.



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the adoption would take the husband's share, would be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener *against their will*. This same consideration influenced their Lordships in deciding *Sri Raghunadha* v. *Sri Brozo Kishoro*[1] that the consent of kinsmen was limited to those kinsmen who are by their union interested in the family property. This view was given effect to by this Court in *Ramji* v. *Ghaman* , *Dinkar* v. *Ganesh* . When such consent was proved to have been given by the party in whom the estate vested, the adoption was upheld, though it had the effect of divesting the party giving such consent of his rights—*Rupchand* v. *Rakhmabai*[4] ; *Babu* v. *Ratnoji* ; *Venkoji* v. *Dutto*[5]. When the consent of the parties in whom the estate vested was not proved, the adoption was held invalid—*Vasudeo* v. *Ramchandra*[7]. It is true in this last case Mr. Justice Candy differed from Mr. Justice Parsons and was of opinion that the decision in *Babu* v. *Ratnoji* was not correct. Mr. Justice Candy was of opinion that *under no circumstances* can an adoption, not made by the widow of the last full owner, be valid so as to divest the heir in whom the estate has vested of his or her rights. As has been shown above, the proposition as thus stated is too broadly put, and that it needs the qualification of 'against their will" or "without their consent" to make it complete. The general rule is subject to certain recognized qualifications and among others to the qualification that the consent of the person in whom the estate has vested, not given at a later stage, but given at the time and with full knowledge, cures the defects, if any, in the formal adoption. Nothing is more common in this country than to find that parents, when they grow old, and have the misfortune of losing an only son in their old age, leaving a young widow behind, think it their duty to console that widow for the loss she has suffered by permitting her to adopt a son in preference to adopting a son themselves. In the present case, Bhimappa was admittedly very old when he died in 1878. His widow Umava was herself sixty years old, while Sarasvati was only twenty

(1) (1876) 3 I. A., 154.
(2) (1879) 6 Bom., 498.
(3) (1879) 6 Bom., 505.
(4) (1871) 8 Bom. H. C. Rep., 114.
(5) (1895) 21 Bom., 319.
(6) R. A., 129 of 1893.
(7) (1896) 22 Bom., 551.

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at the time. Umava not only approved Sarasvati's adoption, but she actually joined with her in executing the varaspatra in 1879, and later on she herself executed a malkipatra in 1882 in favour of the adopted son of Sarasvati. Both deeds are registered and both recite that the adoption was made with the consent of Umava and by the orders of Bhimappa. There was no such consent proved in any of the cases relied upon by Mr. Justice Candy in the case in which he expressed a doubt on this point. This contemporaneous express consent validates the action of Sarasvati in adopting respondent No. 3.

The fourth exception is clearly allied to the one discussed above and is based on the principle of ratification by conduct or acquiescence—*Sadashiv* v. *Hari*[1], *Rajendro Nath* v. *Jogendro Nath*[2]; *Ranji* v. *Lakshmibai*[3]; *Sukhbasi Lal* v. *Guman Singh*[4]. It is not necessary to discuss this point further here, as in this case the adoption is not questioned by Umava. She never disputed the third respondent's status during his life, and in her deposition before the Mamlatdár she gave her consent to have her lands transferred to this respondent's name.

These are some of the qualifications of the general rule. The present case falls under the third exception, and I feel satisfied that the claim has been properly disposed of in the Courts below. I would, therefore, confirm the decree of the lower Court, and dismiss the appeal with costs.

PARSONS, J.:—My learned colleague has dealt so ably and exhaustively with the point of Hindu law at issue in this second appeal, that I feel any thing I can say beyond expressing concurrence with him will be mere surplusage. The validity of an adoption made under circumstances very similar to the present was affirmed by the Chief Justice and myself in *Babu* v. *Ratnoji*[5]. The correctness of this decision was doubted by Candy, J., in the case of *Vasudeo* v. *Ramchandra*[6], but it became unnecessary for the appeal Court to pronounce upon it, as the appeal was decided on other grounds: see *Vasudeo* v. *Ramchandra*[7]. In the mean-

(1) (1874) 11 Bom. H. C. Rep., 190.
(2) (1871) 14 Moo. I. A., 67.
(3) (1887) 11 Bom., 381.
(4) (1879) 2 All., 366.
(5) (1895) 21 Bom., 219.
(6) P. J. for 1896, p. 299.
(7) (1896) 22 Bom., 551.

Candy, J., had been considered by *adgauda*(1) and pronounced to be ion in *Annammah* v. *Mabbu Bali Dharnidhar* v. *Chinto*(3), but not of *Krishnarav* v. *Shankav*(4). My own that the opinion rests on a broadly expressed in the cases the adopting widow is not the would not make an adoption by y difficulty as to the inheritance assent to the adoption given by ance or estate is vested. This and sensible conclusion to come l colleague pronounces it to be of Hindu law.

Decree confirmed.

(3) (1895) 20 Bom., 250.
(4) (1892) 17 Bom., 164.

CIVIL.

stice, and Mr. Justice Fulton.

APPLICANT, *v.* BAMANSHA NDANT), OPPONENT.*

1887), *Sec.* 25—*Civil Procedure nee not according to law—Sub-der catraordinary jurisdiction.*

-4-0, being the balance due on an r claim. The defendant did not ver, dismissed the suit, the only :—"Claim not proved. Claim applied to the High Court under decree was set aside, and a decree

udgment not in accordance with V of 1882), was not according to 25 of the Provincial Small Cause s such order in the matter as it

ordinary jurisdiction.

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Per FARRAN, C. J.:—In a case where there is nothing, to excite suspicion, and where the plaintiff has given such proof of her claim as the law requires, the plaintiff is entitled, and this Court is entitled, to have some indication from the Judge of the point upon which he dismisses the suit, to show that he is not acting from mere caprice or in ignorance of the rules of law which regulate the proof requisite to establish a plaintiff's claim.

Per FULTON, J.:—The ground on which I would base our decision is that the error under section 203 brings the case within our jurisdiction, and that the case being thus before us we are entitled, on being convinced that a failure of justice has occurred, to pass an order which will rectify the mistake.

APPLICATION to the High Court, under section 25 of the Provincial Small Cause Courts Act (IX of 1887), to set aside the decree of Ráo Bahádur Krishnamukhram A. Mehta, Judge of the Court of Small Causes at Broach.

The claim was to recover Rs. 74-4-0, being the balance due on an account (kháta) begun in Samvat 1944 and adjusted at intervals by stamped khátas purporting to be signed by the defendant.

The plaintiff called six witnesses, who gave evidence as to the genuineness of the signature on the various khátas.

The defendant did not appear to defend the suit.

The Judge nevertheless dismissed the suit with costs. The only judgment recorded by him was as follows:—"Claim not proved. Claim rejected with costs."

The plaintiff thereupon applied to the High Court in its extraordinary jurisdiction to set aside the decree, and obtained a rule *nisi*.

Krishnalal M. Jhaveri, for the applicant in support of the rule:—The decision of the Judge cannot be supported. The kháta sued on, which was the last of a series of khátas passed by the defendant to the plaintiff's deceased husband, was amply proved by the evidence. In the absence of the defendant the plaintiff could not possibly do any thing more to prove her claim. The decision is clearly wrong—*Poona City Municipality* v. *Ramji Raghunath*[1].

Hormusji C. Koyaji, for the opponent (defendant) to show cause:—The Judge recorded all the evidence which the plaintiff

(1) (1895) 21 Bom., 250.

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had produced, and passed a decision on the merits. It may be that the decision is wrong, but the Judge has committed no error of law which would enable this Court to interfere under section 25 of the Provincial Small Cause Courts Act. Further, the Judge has not acted beyond his jurisdiction, nor has he committed any material irregularity. This Court has, therefore, no jurisdiction to interfere with his decision.

FARRAN, C.J.:—In this case there has, in my opinion, been a substantial failure of justice, and as the decree is not according to law, I think that we should interfere to assist the plaintiff under the provisions of section 25 of the Provincial Small Cause Courts Act.

The only judgment which the Small Cause Court Judge has recorded is "Claim not proved. Claim rejected with costs." I am not prepared to say, having regard to section 203 of the Civil Procedure Code (Act XIV of 1882) that in all cases where a judgment is recorded in that form this Court should interfere. In many cases the point for determination which forms the basis for dismissing the suit, is obvious upon the face of the proceedings, and it would be a mere technical omission on the part of the Small Cause Court Judge not to state it specifically. The omission to do so could injure no one. But in a case where there is nothing to excite suspicion, and where the plaintiff has given such proof of her claim as the law requires, in my opinion, the plaintiff is entitled, and this Court is entitled, to have some indication from the Judge of the point upon which he dismisses the suit, to show that he is not acting from mere caprice or in ignorance of the rules of law which regulate the proof requisite to establish a plaintiff's claim. To that extent I think that the judgment in *Muhammad Bakar* v. *Bahal Singh*[1] may be safely followed.

The present was a suit on a khâta against a Pársi—an ábkári contractor and presumably educated—who did not appear or offer any defence to the claim, though the summons was duly served upon him. The plaintiff was a Hindu widow. The monetary transactions between the defendant and the plaintiff began during the life-time of the plaintiff's husband. The account opened

(1) (1890) 13 All., 277.

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with an advance to the defendant of Rs. 95-5-9, which was acknowledged by the defendant in his own handwriting, his signature being written over a receipt stamp. The signature appears upon Exhibit A passed in Samvat 1944 and is proved by the witness Jamnadas Mancharam. It is not suggested by the learned pleader, who appeared before us for the defendant, nor is he instructed to say that this or any other of the defendant's signatures which have been put in, is a forgery. The account was continued for several years, and ends with an adjustment contained in Exhibit E, dated in Samvat 1950, showing the sum of Rs. 74-1-0 as due from the defendant to the plaintiff. The signature of the defendant written across a receipt stamp is affixed to this adjustment and is proved by the witness Bhagtidas Pitambar. The claim of the plaintiff would apparently have been time-barred, had it rested upon Exhibit A and Exhibit E alone. She has, however, produced a series of intermediate adjustments, Exhibits B, C and D, purporting to bear the defendant's signatures across a receipt stamp. Being unable to prove these by witnesses who saw them signed by the defendant (her husband, who conducted the business, being dead), or by witnesses who knew defendant's signature, she proved and put in other signatures of the defendant, Exhibits B, C and D, in addition to those on Exhibit A and Exhibit E. The Exhibits G, H and I appear to be signed in the same handwriting as are Exhibits A, B, C, D and E. We asked our translator as to whether they are written by the same hand and he was satisfied that they were.

The chain of proof was thus complete. I entirely fail to see why judgment was not given for the plaintiff. The pleader for the defendant could not suggest any plausible reason why that was not done. He argued that we had no jurisdiction to interfere in such a case as this, but I cannot agree with that contention. The judgment is not in accordance with the law laid down in section 203 of the Code, and there has, I am convinced, been a substantial failure of justice.

I was at first disposed to grant a remand, but am led by a perusal of the judgment of my learned colleague to the conclusion that we ought not to remand the case, but to pass a decree for the plaintiff.

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FULTON, J.:—The section of the Provincial Small Cause Courts Act (IX of 1897) under which this case has been called for, runs as follows:—

"The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit."

The powers conferred by that section are, as pointed out by the Allahabad High Court in *Muhammad Bakar* v. *Bahal Singh*[1], purely discretionary, but apparently, before the Court can make any order reversing or modifying the decree of a Court of Small Causes, it must be satisfied that that decree is not according to law. This seems to be the criterion of its jurisdiction under the section.

What may be the exact meaning of the phrase "according to law" and whether by any ingenuity of reasoning it can, in an extreme case, be held sufficiently elastic to include a clearly erroneous decision of facts, it is unnecessary now to determine. In the present case it is manifest that in the judgment recorded by the Judge of the Small Cause Court the provisions of clause (1) of section 203, Civil Procedure Code, have not been followed.

The claim was to recover Rs. 74-4-0, being the balance due on an account begun in Samvat 1944 and adjusted at intervals by stamped khátas purporting to be signed by the defendant. The defendant did not appear, and the Court had to determine whether the claim was within time and whether the money had been advanced as alleged. The real question to be decided was as to the genuineness of the signatures on the various khátas which were put in to prove the original loan and to bring the case within time. What the learned Judge thought in regard to these signatures, we have no means of knowing. After recording the evidence he simply noted as his judgment "Claim not proved. Claim rejected with costs." But whether he held that none of the signatures was proved, or whether he merely doubted the genuineness of some of them, it is impossible to say, as they severally depended on different bits of evidence. Such a judgment cannot be said to contain the points for determination and the decision thereupon. Consequently it is not such a judgment as is required by section 203, and the decree founded thereon is not according to

(1) (1890) 13 All., 277.

law. What degree of irregularity may be sufficient to justify the interference of this Court, cannot perhaps with safety be laid down. But I think we shall not be going too far if we hold that a decree founded on a judgment not containing the decision on the points required by section 203 is not according to law. This seems almost a necessary corrollary of the judgment of Mr. Justice Candy and myself in Second Appeal No. 885 of 1892, where, following the decision in *Bhagvan* v. *Kesur Kuverji*[1], we reversed the decree of the District Judge and remanded the case to him "to pass a decree according to law, as his judgment contains no particulars as provided by section 574." This section, it is true, requires reasons for the decision of the appellate Court to be recorded. But it may well be, as in the present case, that the want of information in regard to the points for determination and the decision thereon is as inconsistent with the correct appreciation on the part of this Court of the grounds on which the decision is based as a judgment containing no reasons for the decision. Here we can only conjecture what those grounds may have been. The Judge may have disbelieved the evidence of the witnesses who spoke to the execution of Exhibits A and E; or he may have thought, having regard to the danger there often is of accepting mere similarity of handwriting as sufficient proof that a particular signature is genuine, that here the similarity of writing was not so marked as to make it incumbent on him to hold that Exhibits B, C and D were proved; or he may possibly through inadvertence have fallen into some error of law as to the kind of proof requisite to establish any of the facts on which it was necessary for the plaintiff to rely. On all these points we have no information, and as in this particular case it is possible that the brief form of the judgment may conceal an error in law, which would have been apparent if the provisions of section 203 had been complied with, I think that the failure to comply with those provisions was a substantial error in law, and not merely a technical irregularity not affecting the merits of the case. I, therefore, consider that under the section above referred to, this Court has jurisdiction to pass such order with respect to the decree as it thinks fit.

(1) (1892) 17 Bom., 428.

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What that order should be, must depend entirely on the circumstances of the case. No rule, in my opinion, can be laid down for general guidance without trenching on the functions of the Legislature by adding words to the section which are not to be found there. On this point I entirely concur in the remarks of the Chief Justice and Mr. Justice Parsons in *Poona City Municipality* v. *Ramji Raghunath*[1]. In the case of *Muhammad Bakar* v. *Bahal Singh*[2] the learned Judges of the Allahabad High Court, in considering the discretionary powers of the High Court under section 25, said: 'We think we should not interfere under section 25 of the Act unless it clearly appeared to us that some substantial injustice to a party to the litigation had directly resulted from a material misapplication or misapprehension of law or material error in procedure in the Court of Small Causes," but for my part I should hesitate to adopt such a limitation of the powers of the Court. The present case illustrates the danger of attempting to add to the law by laying down a rule outside the words of the Act; for if we were to follow the practice suggested in the above-mentioned judgment, we should, in my opinion, be unable to give any relief to the plaintiff, albeit we consider that she has suffered substantial injustice, because I should have a difficulty in holding that the substantial injustice (*i.e*, the omission to pass a decree for the plaintiff instead of against her) was the effect of the material irregularity. That irregularity, I think, affected the merits of the case, inasmuch as there was an omission to record the Judge's decision on the various points which the plaintiff was entitled to know and which, if recorded, might have enabled her by application for review or under section 25 to obtain a fresh decision; but at the same time I should not in this case have been prepared to interfere, unless I also thought that the ultimate decision was wrong in fact as well as in form. In one sense, of course, it may be contended that the omission to record the findings which the law prescribes is unjust to the plaintiff, inasmuch as it deprives her of means of redress which might otherwise be at her command, but that does not seem to me the real ground for interference in the present case. The real ground appears to be that we think the decree

(1) (1895) 21 Bom., 250. (2) (1890) 13 All., 277.

ought to have been for the plaintiff instead of for the defendant, and I am not prepared to say that I think this error in the decree was the effect of the erroneous form of the judgment. It may well be, and I can see no reason for presuming the contrary, that the learned Judge, who has had long experience and must be well versed in all the sections of the Evidence Act, would have arrived at exactly the same result even though he had strictly followed the requirements of section 203. The ground on which I would base our decision is that the error under section 203 brings the case within our jurisdiction, and that the case being thus before us we are entitled, on feeling convinced that a failure of justice has occurred, to pass an order which will rectify the mistake. The reason why I think the decision is wrong, is that the similarity of handwriting and the evidence recorded leaves no doubt in my mind that all the khátas are genuine having regard to the fact that the pleader for the defendant, who appeared before us, was not instructed to say that they were forgeries, and that the defendant himself, who is an ábkári contractor and as a man of business must be aware of the expediency of making a clear statement of his defence, has never made such statement or offered to give evidence. The case having been fully heard *ex parte* owing to the absence of the defendant in the Small Cause Court, and no reason having been suggested why he should be granted a new trial, I should be disposed to order that the decree of the Court of Small Causes be converted into one for the plaintiff for the amount claimed with costs, including the costs of the present application.

Rule made absolute. Decree for plaintiff.

APPELLATE CIVIL.

Before Sir C. Farran Act, Chief Justice, and Mr. Justice Fulton.

1898. *July* 28

SHRI BEHARILALJI BHAGWATPRASADJI (ORIGINAL DEFENDANT No. 5), APPELLANT, *v.* BAI RAJBAI AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

Hindu law—Widow—Maintenance—Right of maintenance charged on property left by testator—Sale of such property in fraud of widow's right of maintenance—Right of widow as against purchaser—Transfer of Property Act (IV of 1882), Sec. 39—Executor, power of sale of—Probate and Administration Act (V of 1881), Sec. 90, as amended by Act VI of 1889 Sec. 14.

A testator, by his will, gave his widow's maintenance out of the income of his immoveable estate, subject to a limited power of sale or mortgage conferred upon his executrix for a special purpose. It was found by the lower Courts that a large part of the property was sold by the executrix with the object of defeating the claim of the plaintiff, who was one of the testator's widows, and that the purchaser was aware of the fraud.

Held, that the plaintiff was entitled to recover her maintenance out of the property in the hands of the purchaser. The purchaser having been aware of the fraud, the plaintiff's right to maintenance against the property in his hands remained unaffected whether under section 39 of the Transfer of Property Act (IV of 1882) or the law previously in force and irrespective of the possibility of her claim being satisfied from other property.

Section 90 of the Probate and Administration Act (V of 1881) as amended by Act VI of 1889, section 14, gives an executor merely the ordinary powers of sale that an owner would have in so far as they are not limited by the will, and as such, those powers are subject to the usual rules of equity.

SECOND appeal from the decision of Rão Bahadur Chandulal Mathuradas, First Class Subordinate Judge of Ahmedabad with appellate powers.

This was a suit by a widow to recover a house, arrears of maintenance, &c., bequeathed to her by her husband Motibhai Dhoribhai. The first defendant (Hetba) was the mother of the testator and the executrix of his will. Defendant No. 2 was the plaintiff's co-widow and defendants Nos. 3 and 4 were the sisters of the testator. The fifth defendant (appellant) was the purchaser of the whole or nearly the whole of the testator's property (including the house in question) from defendants Nos. 1, 2, 3 and 4.

The testator Motibhai Dhoribhai, of Nadiád, died on the 20th June, 1882, leaving him surviving his mother Hetba (defendant No. 1),

* Second Appeal, No. 43 of 1898.

two widows, *viz.*, Kasanba, and Rajbai (plaintiff), and two sisters Hira and Harkha. By his will, dated the 19th May, 1882 he appointed his mother Hetba (defendant No. 1) "to carry on the *vahivat* of his properties", and he (*inter alia*) gave a legacy of Rs. 601 to his younger widow, Rajbai (plaintiff), to be paid out of his moveable property. He also directed that, if she could not live jointly with the others, she was to be given a house No. 2 for her residence and Rs. 50 every twelve months for her expenses. He further gave his mother Hetba (defendant No. 1) authority for certain purposes to mortgage or sell the property, and after her death the management was to be given to his sister Hira. The following is the material portion of the will:—

"There are at present living my mother named Hetba, and I have two wives, of whom Kasanba is elder and Rajbai is younger, and two sisters Hira and * Harkha. * I authorize my mother Hetba to carry on the *vahivat* of my properties.

"My properties are to be dealt with in the following way. Out of my moveable property Rs. 500 are to be paid to the elder of my wives and the younger should be paid Rs. 601. Both my said wives are after my decease to be obedient to my mother. But if any one of my two wives or both of them cannot take her or their food jointly, the younger wife is to be given house No. 2 for her residence and Rs. 50 (Bhasai currency) are to be paid to her every twelve months for expenses, and the elder one is to be given the western one of the two houses, No 10, for her residence and Rs. 50 for expenses every twelve months. * *

"As to the whole of the immoveable and moveable property that may remain after excluding the properties dealt with above, my mother Hetba has the right of carrying on the *vahivat* thereof as long as she may be alive. And she has authority to effect a mortgage or sale in order to make gifts for charitable and religious purposes for the benefit of her soul and to the mandir at Vatdal * * After my decease and the decease of my mother as to whatever of my above mentioned property may be remaining, after excluding therefrom the property which my mother may have dealt with, the *vahivat* thereof is to be carried on, and the same is to be taken possession of, by my sister Hira.

"On the decease of my wives, after my and my mother's death, as to whatever property belonging to them there may be, the same also is to be enjoyed by the person (or persons) who may be enjoying my property at the time, and the person or persons who may be enjoying the property is or are to make outlays in respect of the obsequial ceremonies in any manner he likes, and the person who may be enjoying the property is to go on paying every year to the wives the maintenance allowance which I have fixed above, or keep them and maintain them together as far as possible. * * *"

1893.

SHRI BEHARILALJI v. BAI RAJBAI.

On the 25th November, 1895, the plaintiff Rajbai brought this suit to recover the house bequeathed to her as above stated and Rs. 84-6-0 arrears of maintenance and the legacy of Rs. 601. She alleged that as she could not agree with her co-widow Kasanba (defendant No. 2) she had begun to live separately in 1893 and had demanded separate residence and maintenance, which were refused. She also alleged that Hetba (defendant No. 1) had fraudulently sold the house bequeathed to her (the plaintiff) to the fifth defendant (appellant) in order to defeat her (the plaintiff's) claim.

The first defendant Hetba pleaded that the plaintiff's claim to the legacy of Rs. 601 was barred by limitation, and she further stated that the whole of the testator's property had been sold to the fifth defendant.

Defendants Nos. 2, 3 and 4 pleaded to the same effect.

Defendant No. 5 answered that he had purchased only a part of the testator's property for which he had paid Rs. 8,750 and that this purchase-money together with the remainder of the testator's property still in the hands of the other defendants were sufficient to satisfy the plaintiff's claim.

The Subordinate Judge held that the plaintiff's claim to the legacy of Rs. 601 was barred by limitation, but he directed that she should be given possession of the house bequeathed to her for residence. As to the arrears of maintenance he ordered that they should be recovered from the first defendant (Hetba) alone.

On appeal by the plaintiff the Judge varied the decree by directing that the plaintiff should recover the maintenance awarded to her from the testator's property, whether in the hands of the first or the fifth defendant. He was of opinion that the property had been fraudulently sold to the fifth defendant in order to defeat the plaintiff's claim to maintenance. In his judgment, after referring to the provisions of the will, he continued: —

"These provisions clearly indicate that whoever enjoys or is in possession of the property should allow maintenance to his widows, including the plaintiff. In other words, their maintenance is made a charge on his property. Defendant No. 5 has purchased a large part of this property; and though, in the absence of any evidence on the point, it is not possible to say that he has purchased it without any consideration whatever, still it cannot be reasonably doubted that he was the religious preceptor of the deceased Motibhai, and is

that of his mother and sisters. The law on the subject is that laid down by section 39 of the Transfer of Property Act (IV of 1882). Where a third person has a right to receive maintenance from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee if he has notice of such intention (section 39). This section is consistent with the observations of Mr. Justice West in the well-known case of *Lakshman* v. *Satyabhamabai*(1). A purchaser taking from a vendor with reason to suppose that the transaction was one originating not in an honest desire to pay off debts or satisfy claims for which the estate was justly liable, and which it could not otherwise well meet, but in a desire to shuffle off a moral and legal liability would, as sharing in the proposed fraud, be prevented from gaining by it (see Mayne's Hindu Law, p 432, 3rd Ed.). It is admitted by the defendant Beharilal that he is in possession of the whole of the property sold and that he knew of the will (No. 66). In fact, it is referred to in his document of sale (Exhibit 49), and if he knew of the will, he ought to have known that the property which he was purchasing was encumbered with the plaintiff's right of maintenance. The purchase was for the comparatively large sum of Rs. 8,750 and the defendant has paid Rs. 2,850 to Motibhai's uncle's son Dwarkadas with a view to buy off what might appear to be his reversionary claim (Exhibit 73). He had also promised to pay Rs. 50 annually to the testator's sister Harkhaba as directed by the will (Exhibit 48). Motibhai was a man of means, and he seems to have left behind him no debts strictly so called. Defendant No. 1 did not sell the property in order to satisfy any claim against the estate. Why did she require such a large amount as that of Rs. 8,750 and what did she do with it? She was under no necessity of selling the property, and she had no authority to sell it. Intention is to be gathered from the acts of the parties. Defendant No. 1 has acted most recklessly and defendant No 5 most cleverly. If the latter had taken the property as a religious gift, he would have taken it burdened with the charges for maintenance. He wants to get rid of that liability by giving it the name of sale. Why was not plaintiff made a party to the sale when all the rest were joined as parties to it? The object was to defeat her rights as well as the rights of the other reversionary heirs. The intention was to take the property unencumbered, and thus to defeat the plaintiff's right of maintenance. It was the intention of the first four defendants to defeat the right, and the last defendant could not have been ignorant of it. The first four defendants were practising the fraud upon her claim, and the fifth defendant had notice of it. If she cannot get her maintenance from the property in the hands of defendant No. 5, I doubt that she can get the house from him. This case ought to be governed by section 39 of the Transfer of Property Act; and the case cited by the fifth respondent's pleader cannot apply. The result is that the plaintiff's claim for maintenance is a charge on her husband's property whether it be in the hands of defendant No. 1 or defendant No. 5."

Defendant No. 5 preferred a second appeal.

(1) (1878) 2 Bom., 494.

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Gokuldas K. Parekh, for the appellant (defendant No. 5) :— We did not buy the whole of the property left by the testator. The plaintiff should look primarily to the other property for her maintenance. Section 39 of the Transfer of Property Act is not applicable. That Act came into force in this Presidency in 1883 while the right of the executrix to sell accrued long before. Section 90 of the Probate and Administration Act (V of 1881) empowers an executor to sell —*Lakshman* v. *Satyabhamabai* [1].

Dafiary, for respondent No. 1 (plaintiff) :—The will gives the executrix a power of sale only under certain circumstances. Almost the whole of the property left by the testator has been sold to the appellant. The appellant who purchased the property knew of the fraud practised upon the plaintiff. Under these circumstances he cannot be exonerated from liability for the plaintiff's maintenance —Mayne's Hindu Law, Secs. 427 and 430 ; *Savitribai* v. *Luxmibai* [2] ; *Kalu* v. *Kashibai* [3].

K. M. Javheri, for respondent No 2 (defendant No. 2).

FARRAN, C. J. :—We are of opinion that the testator by his will gave his widows a right to receive maintenance from the profits of his immoveable estate subject to the limited power of sale or mortgage conferred upon his executrix "in order to make gifts for charitable and religious purposes for the benefit of her soul to the mandir at Vadtal as mentioned above (*i. e.*, for *pundan*) and on other auspicious or inauspicious occasions" if he has not specifically (subject as aforesaid) charged his estate with the payment of such maintenance. We draw this conclusion as well from the general purport of the will as from the express declaration of the testator that he "who may be enjoying the property is to go on paying every year to the wives the maintenance allowance which I have fixed above and to maintain them together as far as possible" This declaration, though it immediately follows a direction to the person who may enjoy the property after the death of the testator's wives and mother as to the performance of their several obsequial ceremonies, appears to be a general direction as to the maintenance of his wives, and not a direction confined to the person who is to enjoy the property after the mother's death. The testator's widows are,

(1) (1878) 2 Bom., 494. (2) (1878) 2 Bom., 573.
(3) (1883) 7 Bom., 127.

we think, under the terms of the will, in a position exactly analogous to, if not more favourable than, that of a widow entitled under the general Hindu law to maintenance out of family property in the hands of one of the surviving members of such family.

It was argued by Mr. Gokuldas for the appellant that the Transfer of Property Act relied on by the First Class Subordinate Judge, A. P., was inapplicable to the present case notwithstanding that the conveyance to the fifth defendant took place after it had come into force. He contended that the right of the executor to sell the property which had accrued on the death of the testator in 1882, could not be reduced by the provisions of section 39 of the Transfer of Property Act IV of 1882 having regard to the provisions of section 2. Probably this argument is correct, but the point is not material, as it does not appear that section 39 has made any change in the law as explained in Mr. Justice West's judgment in *Lakshman* v. *Satyabhabamai*[1]. That judgment had evidently been carefully considered by the Subordinate Judge, and we think that its principles were correctly applied. The Subordinate Judge found that the fifth defendant was aware of the fraud on the plaintiff that was practised by the first four defendants in order to defeat her claim to maintenance, and in these circumstances her right to maintenance remained unaffected against the property in his hands whether under section 39 of the Transfer of Property Act or the law previously in force, and irrespective of the possibility of her claim being satisfied from other property. At page 520 Mr. Justice West said: "I find a difficulty in accepting the doctrine that it depends on how the widow's claim may or can be met, whether she can have recourse to property already sold to provide her with maintenance. . . . What was honestly purchased is free from her claim for ever: what was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first." The law thus laid down was not seriously attacked, and we think we ought to follow it.

As regards section 90 of the Probate and Administration Act, 1881, as amended by Act VI of 1889, which, it was contended, gave the executor full power to dispose of the property, we think

(1) (1878) 2 Bom., 494.

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that the will in this case impliedly imposes a restriction upon the power of the executrix to dispose of the immoveable property of the testator, and that the section relied on does not assist the defendant. It was not indeed until the reply that the pleader for the appellant was driven to rely upon it. The general purport of the will evidently evinces a desire upon the part of the testator to keep the property intact, and the limited power of sale already referred to is, we think, a clear indication of the testator's desire to restrict his executrix to a power of sale for the special purpose which he has specified. Besides, it is not clear that the section precludes the application of the equitable principle on which the decision in *Lakshman* v. *Satyabhamabai* is based and which has been embodied in section 39 of the Transfer of Property Act. It cannot seriously be argued that section 90 of the Probate Act in any way supersedes section 39 of the Transfer of Property Act, as there is nothing in the section itself to indicate any such intention. It seems to give the executor merely the ordinary powers of sale that an owner would have in so far as they are not limited by the will, and as such those powers would be subject to the usual rules of equity. We confirm the decree with costs.

Decree confirmed.

ORIGINAL CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Strachey.

1898. *April* 15.

TRIMBAK GANGADHAR RANADE (ORIGINAL PLAINTIFF), APPELLANT. *v.* BHAGWANDAS MULCHAND AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS *

Mortgage—Power of sale—Suit to set aside sale under power of sale—Promise by mortgagee to postpone sale—Evidence of such promise admissible—Evidence Act (I of 1872), Sec. 92, proviso 4—Contract Act (IX of 1872), Sec. 63—Transfer of Property Act (IV of 1882), Sec. 69—Town of Bombay, limits of.

The plaintiff mortgaged certain property to the first defendant on 28th December, 1895. By the mortgage-deed the mortgage-debt was made repayable on 28th December, 1896. On the 12th May, 1897, the first defendant sold it by auction under the power of sale contained in the mortgage-deed,

* Suit No. 307 of 1897. Appeal No. 968.

and the second defendant was the purchaser. The plaintiff now sued to set aside the sale and to be allowed to redeem, alleging that on the day before the sale the first defendant had orally promised and agreed to postpone the sale for four days and that the second defendant had notice of this fact before he purchased the property.

Held, that evidence of such oral agreement was admissible. It was not an agreement to modify any of the terms of the mortgage, it was merely an agreement to forbear, for a period of four days, from the exercise of the power of sale given by the mortgage. It, therefore, did not fall within proviso 4 of section 92 of the Evidence Act (I of 1872).

Held, also, that the said promise or agreement, if made by the mortgagee, was not an extension of time for the performance of the plaintiff's (mortgagor's) promise to him, which was to pay the mortgage-debt on the 28th December, 1896, but was an agreement to refrain from exercising, for a stated period, the right of sale arising from non-performance, and, therefore, section 63 of the Contract Act (IX of 1872) did not apply.

Land situate in the district of Máhim within the island of Bombay, and within the local limits of the original jurisdiction of the High Court, is situate within the town of Bombay, in the sense in which that expression is used in section 69 of the Transfer of Property Act (IV of 1882).

SUIT by a mortgagor for a declaration that a sale by a mortgagee was void, and to be allowed to redeem the mortgage.

The plaintiff was the owner of certain property situate at Lower Máhim in the island of Bombay, which he mortgaged on the 28th December, 1895, to the first defendant (Bhagwandas) for Rs. 8,000 to be repayable in one year.

On the 8th January, 1897, the first defendant's solicitors gave notice to the plaintiff that, unless the mortgage-debt was paid off within three months, the property would be sold under the power of sale contained in the mortgage-deed.

On the 28th April, 1897, the sale was advertised for the 12th May, 1897. On that day accordingly it took place and the mortgaged property was sold to the second defendant (The Standard Mills Company) for Rs. 9,350.

The plaintiff alleged that on the evening of the 11th May, *i. e.*, the day before the sale, he had an interview at Ghát Cooper with the first defendant, at which the latter agreed to give him four days' time within which to pay off the mortgage-debt, and promised that the sale fixed for the next day should be postponed; that he (the

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first defendant) told the plaintiff to meet him the following morning at his (the defendant's) solicitor's office, in order that the necessary steps might be taken for the postponement, that he met the first defendant accordingly as arranged, but that the defendant left the office, telling him to await his return, that the plaintiff accordingly waited for several hours in the office, but the defendant did not return; that finding that the defendant did not return, he (the plaintiff) went to his own solicitors and caused a letter to be written to the defendants' solicitors stating the agreement to give four days' time and warning them not to permit the sale to take place. This letter he also caused to be read at the auction, which nevertheless took place in the evening of that day.

The plaintiff further alleged that, but for the first defendant's conduct in causing him (the plaintiff) to wait for several hours at the solicitors' office on the 12th May, he would have been able to procure the money required to pay off the debt and thus have prevented the sale.

The money was subsequently procured by the plaintiff and was tendered to the solicitors of the first defendant, but the tender was refused and the conveyance of the property to the second defendant was completed.

Kirkpatrick (with *Macpherson*) for plaintiff.

Robertson (with *Davar*) for defendant No. 1.

Anderson (with *Lang*, Advocate General) for defendant No. 2.

The following authorities were cited:—Transfer of Property Act (IV of 1882), Sec. 69; Fisher on Mortgage, p. 460; Coote on Mortgage, pp. 475, 476; *Orme* v. *Wright*[1]; *Selwyn* v. *Garfit*[2]; *Jenkins* v. *Jones*[3]; *Parkinson* v. *Hanbury*[4]; General Clauses Act, X of 1897, Sec. 3, clause 41.

FULTON, J.:—(Having found upon the evidence that the first defendant had promised the plaintiff to postpone the sale for four days, and had told him to wait at the solicitors' office as alleged by the plaintiff, His Lordship continued:—)

(1) (1838) 3 Jur., 19.
(2) (1888) 38 Ch. D., 273.
(3) (1860) 2 Giff., 99.
(4) (1860) 1 Dr. and Sm., 143.

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So far I have found the above facts in the plaintiff's favour, but when I come to the question whether by these occurrences the plaintiff was prevented from paying off the money in time to stop the sale I am obliged to find against him. He has not proved that his negotiations to raise money were in such an advanced condition that he could by any possibility have paid the money on the 12th. He says he could have done so if he had not been kept waiting at the solicitors' office, but his statement is contrary to all probability. He evidently did not think so himself. If he had thought so, there would have been no object in his begging for time. No witness has been called to say that he was ready, or would have been ready had he been asked to advance the money on the 12th May. It is true a tender of Rs. 8,500 was made on Monday the 17th. But it is contended by the defence that this was merely a sham tender, the money being lent for the purpose with the assurance that it would not be accepted It is impossible to see how it could have been accepted by Bhagwandas' solicitors after he had by the auction bound himself to sell to the second defendant. But, of course, it cannot be said with certainty that the facts were all known to the man who advanced the money, and it is possible that the tender was made seriously in the hope that in some way or the other it would be accepted. Assuming, however, that the tender was made with the hope of its being accepted, and that by the 17th the plaintiff was really in a position to pay off the mortgage, there is nothing to show that he was in that position, or that he might have been but for this detention at the solicitors' office on the 12th.

I do not think it is proved that the property was sold at an undervalue. The evidence is contradictory and leaves the point doubtful, but I do not think the question really affects the determination of the suit. Had anything turned on the point, it would have been necessary to appoint an independent commissioner to value the property.

On these facts I have to consider the law to be applied. It was contended that, under proviso 4, section 92, of the Evidence Act (I of 1872) an oral agreement could not be proved. Possibly this is the case. But the so-called agreement made at Ghát

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Cooper was a purely gratuitous promise which could not be relied on as a contract. If the plaintiff had shown that he was in a position to pay the money on the 12th, and was precluded from doing so by his reliance on the mortgagee's promise, the case would have been different. To such a state of circumstances I do not think section 92 would have applied, and if, knowing of such circumstances, the purchaser had bought I apprehend that he would have been treated as a trustee for the mortgagor, who by a breach of faith of which he was aware, had been prevented from redeeming his property whilst there was still time. In such circumstances I doubt whether the purchaser could have relied on section 69 of the Transfer of Property Act, 1882, or on any other section. But as matters stand, I cannot see that there was any equity against the purchaser. The mortgagee was exercising his legal right of sale, which subsisted so long as the property was not redeemed. The mortgagor has not shown that by any reasonable possibility he could have redeemed before the hour fixed for the sale. The breach of promise on the part of the mortgagee may have been a serious disappointment to the mortgagor, but I do not think that his position was really altered for the worse by this fact. The purchaser who was anxious to buy, and is not shown to have acted in collusion with the mortgagee, could not have refrained from bidding without running the risk of losing the property altogether. I think, then, he is entitled to stand on his legal rights, and no ground has been shown for setting aside the sale.

It was also contended that a sale during plague time was unfair and inequitable. But I think the mortgagee was entitled to enforce his rights. There is no analogy between a case, like this, of a sale during the continuance of a calamity of uncertain duration and (as in *Orme* v. *Wright*) a sale purposely fixed for an election day when it was certain that few people would bid. It is a misfortune for the mortgagor if property was unduly depreciated at that time, but that is a risk which seems inseparable from his position. The sale was not specially hurried on. The mortgagee had for months been asking for payment and he was consequently entitled to sell, which he did, after the usual advertisement of the intended sale.

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The only other point to which I need advert is a curious one urged on behalf of the plaintiff, *viz.*, that property at Máhim is not property within the town of Bombay. (Transfer of Property Act (IV of 1882), Sec. 60.) It must be conceded that, in ordinary language, land at Máhim though within the island would not be described as within the town of Bombay. But to construe the section correctly, the history of the island must be borne in mind. In this island previously to the introduction of the Act the mortgagee was entitled to exercise the powers of sale conferred by a mortgage in English form, and it may safely be said that it was not the intention of the Legislature while preserving the power in one part of the island to withdraw it in another. It is true that the Court must be very careful not improperly to depart from the words of the law, but to a case like the present, where the intention of the Legislature is clear, I think I must apply the principle contained in *Salmon* v. *Duncombe*[1] and treat the word "town" in its application to Bombay as referring to the whole island. To construe it otherwise would make the section in its reference to Bombay wholly unreasonable. In section 2 of Act XIII of 1856 for regulating the Police in the Towns of Calcutta, Madras and Bombay, the word town is defined to mean all places within the local limits of the jurisdiction of Her Majesty's Supreme Court. A similar definition is given in Act XIV of the same year. In Act IV of 1857 it is provided that the words "Town of Bombay" shall include all places within the islands of Bombay and Colába. In the Bombay municipal legislation commencing with Bombay Act II of 1865 "City" is the word used. In the General Clauses Act X of 1897 "Presidency town" is clearly defined. No definition of the words "Town of Bombay" applicable to all Acts of the Government of India has been pointed out as in force when the Transfer of Property Act was enacted. But as we find that in some Acts the phrase was expressly defined as relating to the whole island, it seems not unreasonable to suppose that the term was not considered inappropriate and was employed in other Acts in the sense which in some it was expressly declared to bear. For legislative purpose the expression appears to have acquired a technical meaning. On

(1) (1886) 11 Ap Ca, 627.

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the issues I find as follows —(His Lordship stated his findings) I reject the claim and direct that the plaintiff should pay the costs of the second defendant. Having regard to my finding on the first issue I think that the first defendant should pay his own costs

The plaintiff appealed.

Kirkpatrick and *Raikes* for appellant —They referred to the Contract Act (IX of 1872), Sec 63, *Davis* v. *Candasami*[1]; *Albert* v. *Grosvenor Investment Co.*[2]; *Williams* v. *Sears*[3]; *Selwyn* v. *Garfit*[4], Conveyancing Act (1881), Sec. 21; Fisher on Mortgage (5th Ed.), p. 459, para. 961; *Bailey* v. *Barnes*[5].

Russell and *Davar* for respondent No. 1 (defendant No. 1):— They cited *Mumford* v. *Peal*[6], *Tucker* v. *Laing*[7]; Evidence Act (I of 1872), Sec 92, Contract Act (IX of 1872), Sec. 25.

Anderson (with *Lang*, Advocate General, and *Scott*) for respondent No. 2 (defendant No. 2).

The judgment of the Court was delivered by

STRACHEY, J.:—(His Lordship, after examining the evidence, differed from Fulton, J., and found that no agreement to postpone the sale was proved, and continued —)

The first defendant in the witness-box has given a complete denial to the plaintiff's allegations. The evidence adduced by the plaintiff is not of a quality which removes the doubts which the improbabilities of his story have produced in our minds. We have, therefore, come to the conclusion that he has failed to prove any promise or agreement on the part of the first defendant to grant four days' time for payment of the mortgage-debt or to postpone the sale. It was contended on behalf of the first defendant that no oral agreement of one kind alleged by the plaintiff could be proved, having regard to the fourth proviso to section 92 of the Evidence Act. It appears to us, however, that

(1) (1896) 19 Mad., 398.
(2) (1867) L. R., 3 Q. B., 123.
(3) (1879) 5 Q. B. D., 409.
(4) (1838) 38 Ch. D., 273.
(5) (1894) 1 Ch., 25.
(6) (1880) 2 All., 863.
(7) (1856) 2 K. and J., 745.

such an agreement would not be an agreement to rescind or modify a contract, grant or disposition of property within the meaning of the proviso. It would be an agreement by the mortgagee, not to modify any of the terms of the mortgage of the 28th December, 1895, but to forbear for a period of four days from the exercise of the power of sale which it created. We see no reason why such an oral agreement could not be validly made and proved.

Assuming the Division Court to be right in its finding that the first defendant on the 11th May, 1897, promised to give the plaintiff four days time, the question arises, what is the legal effect of such a promise? It would be, as we have said, a promise by a mortgagee having a power of sale to forbear from the exercise of the power for four days. Now there was admittedly no consideration for the promise, no benefit to the mortgagee or detriment to the mortgagor: the arrangement was exclusively for the mortgagor's advantage. The learned counsel for the plaintiff sought to meet this difficulty by relying on section 63 of the Indian Contract Act, which provides that every promisee may extend the time for performance of the promise made to him, and on the decision in *Davis* v. *Cundasami* [1], where it was held that an agreement extending the time for the performance of a contract falling under section 63 of the Contract Act does not require consideration to support it. Without expressing any opinion upon that proposition, it appears to us that section 63 of the Contract Act does not apply to the case before us. It occurs in a group of sections headed "Contracts which need not be performed", and it enables a promisor, where the time for performance of his promise has been extended by the promisee, to plead such extension in answer to a demand for performance at the time originally fixed by the contract. The extended time is substituted in the contract for the original time. Now, in the contract of mortgage, the time for performance of the mortgagor's promise was the due date, the 28th December, 1896. No extension or alteration of that time was ever made by the mortgagee. Under the deed the power of sale was not to be exercised unless default should be made in

[1] (1896) 19 Mad., 398.

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payment of the principal debt on the due date, and until three months after notice in writing requiring such payment had been served on the mortgagor. No payment was made on the due date. The necessary notice in writing was given on the 8th January, 1897. In April the three months expired, and the power of sale thereupon became exercisable under the deed and under section 69 of the Transfer of Property Act, IV of 1882. On the 28th April the mortgagee advertised the property to be sold on the 12th May. That was the state of things existing on the 11th May, when the mortgagee's agreement to give four days' time is alleged to have been made. Up to that date it is not suggested that there was any extension of time. Now, assume that on the 11th May the mortgagee promised to give the mortgagor four days' time, and meanwhile to postpone the sale. Such a promise no doubt involved a forbearance of the exercise of the power of sale, and a consequent extension for the same period of the mortgagor's right to redeem, which may always be exercised up to the moment of sale. But it was not an extension of the time for the performance of the mortgagor's promise to pay the mortgage-debt as fixed in the deed, in the sense in which the expression 'time for performance of the promise' is used in section 63 of the Contract Act. The time for performance in that sense never ceased to be the 28th December, 1896. After that date the mortgagor was still bound to pay the debt and could have redeemed on payment, although the time for performance had passed. To say that a promise by the mortgagee on the 11th May to postpone the sale would extend the time for performance of the mortgagor's promise under the contract, is as incorrect as to say that on the 10th May there were still two days within which the mortgagor's promise might be performed. The time for performance of the contract must not be confounded with the time within which, notwithstanding default in performance, the mortgagor in default might still redeem. It follows that the mortgagee's agreement of the 11th May, if made, was not an extension of the time for performance of the mortgagor's promise to him, but an agreement to refrain from exercising for a stated period the right of sale arising from non-performance. That being so, section 63 of the Contract Act does not apply.

The facts in *Davis* v. *Cundasami* were totally different. A case much more nearly resembling the present is *Williams* v. *Stern* [1]. It appears to us that if, contrary to the conclusion at which we have arrived on the question of fact, the first defendant agreed on the 11th May to give the plaintiff four days' time and to postpone the sale, the agreement was not binding on him, because there was no consideration to support it. It was contended on behalf of the plaintiff that, apart from the question of agreement, the first defendant was in some way estopped: that he misled the plaintiff into the belief that the sale would not be held on the 12th May, and that the plaintiff, if not so misled, might have been able to raise the amount of the debt and pay it in time to prevent the sale. As in the case of *Williams* v. *Stern*, the first defendant's promise, if made, was not a misstatement of existing facts which operated to the plaintiff's disadvantage: it was merely the expression of an intention, a "mere naked promise" not enforceable in law. We agree with the Division Court that there is no evidence to show that the plaintiff was prevented by any act of the first defendant from paying the mortgage-debt in time to stop the sale. He says that he was prevented because, in consequence of the first defendant's promise, he remained at Messrs. Wadia and Ghandy's office more or less from 10 A.M. until 3 P.M. on the 12th May. The auction took place soon after 5-15 P.M. Upon his own showing, the plaintiff clearly did not believe that he could raise the money in four or five hours, or he would not have asked for four days. He made a tender of the mortgage money for the first time on the 17th May. In our opinion, there is no ground for the contention that, but for the first defendant's conduct on the 11th and 12th May, the plaintiff would have been in a position to pay off the debt before the sale took place on the 12th.

In this view of the case, the power of sale was not improperly or irregularly exercised within the meaning of the deed and of section 69 of the Transfer of Property Act, 1882, and it is unnecessary to inquire whether, upon the contrary view, the title of the purchaser, the second defendant, would have been impeachable on the ground of express notice. Upon another point we

(1) (1879) 5 Q. B. D., 409.

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need only say that we agree with the Division Court that the mortgaged property, being situate at Máhim within the island of Bombay and within the local limits of this Court's original civil jurisdiction is situate within the town of Bombay, in the sense in which that expression is used in section 69. The decree of the Division Court must be confirmed, but as we differ from the learned Judge's finding on the first issue, the plaintiff must pay the costs in that Court of the first as well as of the second defendant. The plaintiff must also pay the costs of this appeal.

Attorneys for plaintiff:—Messrs. *Payne, Gilbert, and Suyani.*

Attorneys for defendants:—Messrs. *Wadia and Ghandy,* and Messrs. *Ardesir, Hormusji and Dinsha.*

ORIGINAL CIVIL.

Before Mr. Justice Strachey; and, on appeal, before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Fulton.

1898. *November* 11.

GREAT INDIAN PENINSULA RAILWAY COMPANY (ORIGINAL DEFENDANTS), APPELLANTS, *v.* THE MUNICIPAL CORPORATION OF BOMBAY AND H. A. ACWORTH, MUNICIPAL COMMISSIONER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Water-works—Municipality of Bombay—Right to enter on land of Railway Company to lay pipes, &c.—Bombay Municipal Act (Bom. Act III of 1888), Secs. 222 265—Railway Act IX of 1890, Sec. 12—Accommodation works.

Under the Bombay Municipal Act (Bom. Act III of 1888) the Corporation of Bombay has the right, for the purpose of supplying the city with water, to enter upon land belonging to other owners, to make connections between the mains, and to lay the pipes forming the connections through or under such lands without the owners' permission, though not without giving them reasonable notice in writing.

Held, also, that section 12 of the Railways Act (IX of 1890) does not exclude the above right of the Corporation of Bombay to enter on land belonging to the G. I. P. Railway Company for the said purposes.

SUIT by the Municipal Corporation of Bombay to obtain a declaration that certain land mentioned in the plaint was vested in them, and that, even if it was not, they were entitled to enter upon it for the purpose of executing certain works necessary to supply water to the City of Bombay, and for injunction, &c.

* Suit No. 378 of 1894; Appeal No. 984.

The plaint alleged that by virtue of Act XIII of 1863 and subsequent Acts of the Legislature the land in question with other lands was vested in the plaintiffs for the purpose of carrying the water of the Vehár Lake into the town of Bombay and there distributing the same; that in January, 1894, the plaintiffs desired to make a connection in the Vehár 32″ main for the purpose of carrying Vehar water into the Arthur Road 27″ main. They also proposed to make a connection between the Tánsa 48″ main and the Vehár 32″ main. The two places at which these works respectively were to be executed were marked X and Y, respectively, in a plan annexed to the plaint.

The following are the material paragraphs of the plaint:—

"1. The plaintiffs by their workmen on the 29th day of January, 1894, entered on the land through which the said Vehár 32″ main runs at the spot marked with the letter Y on the said plan and began to excavate the soil over the said Vehár main for the purpose of making the connection second above mentioned, but the defendants claimed to be entitled to refuse to allow the plaintiffs' men to work at the said spot without their permission, and the defendants claim the land through which the said Vehár main runs at the said place as their own, and refuse to allow the plaintiffs to make the connection aforesaid, or to enter upon the said land at the place aforesaid, except upon conditions which the plaintiffs are not bound to agree to.

"5. The plaintiffs say that the land at the places marked X and Y on the said plan is vested in the plaintiffs and is not the property of the defendants as they allege, and in the alternative the plaintiffs say that, if they are wrong in this contention and the said land is the property of the defendants, yet nevertheless the plaintiffs are entitled to enter on the said land in the way and in the manner and for the purposes that they entered on the same on the 29th day of January, 1894, and that the defendants are not entitled to prevent them so entering."

The prayers of the plaint were as follows:—

"1. That it may be declared that so much of the land shown in the plan deposited in the office of the Secretary to Government of Bombay mentioned in the 2nd paragraph of this plaint as occupied by the Vehar pipe as corresponds with the places marked X and Y on the plan Exhibit A hereto annexed is vested in the plaintiffs.

"2. That it may be declared that the plaintiffs are entitled to enter upon the land at the said places marked X and Y as aforesaid for the purposes mentioned in the 3rd paragraph of this plaint even if the land is the property of the defendants, without the permission of the defendants.

"3. That the defendants may be restrained by the order and injunction of this Honourable Court from preventing the plaintiffs, their servants and agents enter-

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ing upon the said land at the places marked X and Y as aforesaid for the purposes mentioned in paragraph 3 of this plaint or for any other purpose for which the plaintiffs may lawfully enter thereon."

The defendants by their written statement did not admit that the land in question was vested in the plaintiffs, and submitted that, even if it was, the plaintiffs, having regard to section 12 of the Railways Act (IX of 1890), were not justified in entering upon the defendants' land and attempting to do the said work without the permission of the defendants. They further contended as follows:—

"2. The defendants say that in the months of September, 1893, and January, 1894, the plaintiffs' servants, without the permission of the defendants, entered upon the defendants' land for the purpose, as alleged by the said servants, of laying down therein 2 pipes to connect the 32" Vehár main with the Tánsa main; portions of both these pipes were intended to be placed upon land of the defendants. The defendants will rely upon a plan furnished by the plaintiffs' engineer to them showing the proposed connections and upon the correspondence, copies whereof are hereto annexed and marked collectively No. 1.

"3. The defendants say that, irrespective of the provisions of section 12 of the Railway Act, 1890, the plaintiffs were not justified by any of the provisions of the Municipal Act, 1888, in doing what they attempted to do, and that the defendants were justified in preventing the plaintiffs' said servants from making the said connections.

"4. The defendants do not admit that the land at the places marked X and Y on the plan annexed to the plaint and marked A, is vested in the plaintiffs, but the defendants say that it is the property of the defendants, having been acquired by them in the year 1869. The defendants submit that in no event were the plaintiffs entitled to enter on the said land in the way or in the manner or for the purpose that they entered on the same on the 29th January, 1894."

The case was tried by Strachey, J., in December 1897.

Inverarity and *Loundes* appeared for the plaintiffs.

Lang (Advocate General) and *Russell* for the defendants.

The following issues were raised:—

1. Whether all the lands and other immoveable property necessary for the purpose of carrying the water of the Vehár Lake by pipes into Bombay is vested in the plaintiffs?

2. Whether the land, the subject-matter of this suit, is vested in the plaintiffs?

3. Whether the land described in the plaint is not the property of the defendants?

4. Whether the plaintiffs are entitled to enter or justified in entering upon the land in question in the way and in manner and for the purposes alleged in the plaint?

5. Whether the defendants are not justified in preventing the plaintiffs' servants from entering upon the said land for the purposes mentioned?

6. Whether, having regard to the provisions of the Railway Act IX of 1890, the defendants were not justified in preventing the plaintiffs and their servants from entering into the land?

7. General issue.

The following is the material portion of the judgment delivered by the lower Court: —

STRACHEY, J. (after examining the evidence as to title continued —) The state of the title to the property in dispute is, therefore, this. The Vehár main, including the parts of it shown on Exhibit I, where the plaintiffs proposed to make the connections, is vested in the plaintiffs. The soil above the main is vested in the defendants. The space of 22 inches between the western skin of the main and the railway fence is vested in the defendants. The land west of the railway fence as far as 233 feet north of the Arthur Road is vested in the plaintiffs. The result is that everything done in this case by the plaintiffs west of the fence was done upon their own property, but that in crossing without the permission of the defendants the space of 22 inches between the fence and the main they committed a trespass, unless they can show express statutory authority justifying their action.

In considering the right of the plaintiffs to enter, for purposes connected with the water-works, upon land vested in other persons, and to make the proposed connections upon such land, it is not necessary to refer to any enactment earlier than the City of Bombay Municipal Act, III of 1888. The subject is dealt with by Chapter X of that Act. The first section of Chapter X, section 261, gives the Municipal Commissioner for the purpose of providing the city with a proper and sufficient water-supply, and when authorized by the Corporation in that behalf, power to construct and maintain water-works either within or without the city, and do any other necessary acts, necessary, that is, for the purposes specified, to purchase or take on lease any water-work, and to enter into an arrangement with any person for a supply

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of water. Section 262 provides that the Commissioner shall manage all water-works belonging to the Corporation, maintain them in good repair and efficient condition, "and shall cause all such alterations and extensions to be from time to time made in the said water-works as shall be necessary or expedient for improving the said works." That section does not require the authority of the Corporation for necessary or expedient alterations or extensions of existing water-works, as distinguished from the construction of water-works provided for by section 261. The making of the proposed connections between the Vehár and Tánsa and Arthur Road mains would be an alteration or extension of municipal water-works, and would, it is not denied, be necessary or expedient for improving them within the meaning of the section. It has been argued with reference to the interpretation clause, section 3 (*t*), including within the term water-work a duct, main-pipe, and any "thing for supplying or used for supplying water," that the laying down of any new pipe, such as those required for the proposed connections, would be "constructing water-works" within the meaning of section 261, and would require a resolution of the Corporation, which admittedly has not been passed. In my opinion, however, section 261 refers only to any future water-works which the Commissioner may construct or acquire, and not to additions to water-works, like the Vehár water-works, already existing and vested in the Corporation when the Act came into force. The distinction between extensions of an existing system of water-works by additions or improvements within the area previously supplied and previously within the jurisdiction of the Corporation, and a "construction" of new water-works, is not only plainly recognized by sections 261 and 262, but illustrated by the most recent decisions in England upon the analogous provisions of the Public Health Act, 1875—*Cleveland Water Company* v. *Redcar Local Board*(1); *Huddersfield Corporation* v. *Ravensthorpe Urban District Council*(2). Section 263 deals with the right of access to municipal water-works. It provides that the "Commissione . . . may, for the purpose of inspecting or repairing or executing any work in, upon, or in connection with, any municipal water-work, at all reasonable times,

(1) (1895) 1 Ch., 168. (2) (1897) 2 Ch., 121.

(*a*) enter upon and pass through any land, within or without the city, adjacent to or in the vicinity of such water-work, in whomsoever such land may vest, (*b*) convey into and through any such land all necessary materials, tools, and implements." That would include a right to enter upon the land in dispute vested in the defendants for the purpose of making the proposed connections. It is not alleged that the times at which the plaintiffs proposed to make the connections were not reasonable. So far, although the Act clearly recognizes the right of the plaintiffs to extend and alter their mains, and gives them a right of access with all necessary implements for the purpose of making connections, it says nothing about the right to lay the pipes forming the connections upon land vested in other persons. That, however, is the effect of section 265 read with an earlier section of the Act. Section 265 provides that "the Commissioner shall have the same powers and be subject to the same restrictions for carrying, renewing, and repairing water-mains, pipes and ducts within or without the city as he has, and is subject to, under the provisions hereinbefore contained, for carrying, renewing and repairing drains within the city." The preceding provisions of the Act relating to drains are contained in Chapter IX. The only provisions relating to drains which, it has been suggested, are made applicable by section 265 to water-works are sections 220, 221 and 222. Section 220 merely provides that all municipal drains shall be under the control of the Commissioner. Section 221 provides that "the Commissioner shall maintain and keep in repair all municipal drains, and, when authorized by the Corporation in this behalf, shall construct such new drains as shall from time to time be necessary for effectually draining the city." If, as regards repair, that section is made applicable by section 265 to water-works, it adds nothing to section 262. If, as regards constructions of new works, section 221 is made applicable by section 265 to water-works, it adds nothing to section 261. As section 265 makes applicable to water-works only the powers and restrictions given to and imposed on the Commissioner for carrying, renewing and repairing drains, and does not refer to the construction of new drains, it does not, in my opinion, make the latter part of section

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221 applicable to water-works. If by reason of section 265, the latter part of section 221 applied to the construction of new water-works, that would not, for the reasons which I have already given in reference to section 261, affect the proposed connections, which are not the construction of new, but the alteration and extension of existing water-works. That disposes of Mr. Russell's argument based on the words common to sections 221 and 261, "when authorized by the Corporation in this behalf." The only other section in Chapter IX which has been referred to is section 222. That section is clearly made applicable by section 265 to water-works. It provides that "the Commissioner may carry any municipal drain through, across or under any street . . . and, after giving reasonable notice in writing to the owner or occupier, into, through, or under any land whatsoever within the city." Reading this as applying to water-works, it supplements sections 262 and 263 by adding to those provisions for alterations and extensions of water-works, and for access to them for inspection repair, or the execution of any work, a further power to carry pipes into, through, or under any land whatsoever, which would, of course, include the land in dispute vested in the defendants, after giving reasonable notice in writing to the owner or occupier. In the present case the reasonable notice in writing was given by a letter from the Water Engineer to the Chief Engineer, dated the 26th October, 1893, (Exhibit M) and enclosing a tracing (Exhibit J) which showed the proposed connections.

Unless, therefore, the defendants can point to some enactment excluding or modifying the operation of those just cited, the plaintiffs have, under their Act, the right to enter upon the land in dispute, even where vested in the defendants, to make connections between their mains, and to lay the pipes forming the connections through or under the defendants' land, and to do all this without the defendants' permission, though not without giving them reasonable notice in writing. The defendants, however, do point to an enactment which, they contend, excludes or modifies the operation of Act III of 1888 so far as the railway property is concerned. They rely on section 12 of the Indian Railways Act, IX of 1890, which provides that "if an

owner or occupier of any land affected by a railway considers the works made under the last foregoing section to be insufficient for the commodious use of the land, or if the local Government or a local authority desires to construct a public road or other work across, under or over a railway, he or it as the case may be, may at any time require the Railway Administration to make at his or its expense such further accommodation works as he or it thinks necessary and are agreed to by the Railway Administration, or as, in case of difference of opinion, may be authorized by the Governor-General in Council." Mr. Russell contended that the proposed connections were "further accommodation works" within the meaning of this section, and that the plaintiffs, who are a 'local authority' as defined by section 3 of the General Clauses Acts, 1887 and 1897, cannot themselves make the connections, but can only require the defendants to make them at the plaintiffs' expense. The word "Railway" is defined by section 3 of Act IX of 1890 as including 'all land within the fences or other boundary marks indicating the limits of the land appurtenant to a railway"; and, therefore, if, contrary to the conclusion which I have already stated, the land in dispute outside the railway fence is vested in the defendants, Mr. Russell's argument will not apply to it. Mr. Russell supported his contention by referring to sections 7 and 8, under the latter of which, he said, the defendants might, subject to certain conditions, and for the purpose of exercising the powers conferred on them by the Act, alter the position of the Vehár main itself or of any pipe vested in the plaintiffs. It appears from the evidence of Mr. Campion, and from the letters of the Chief Engineer and the Agent, which have been put in, that the defendants contend for an extremely wide application of section 12. Mr. Campion, for instance, says that, although the defendants "would not object to anything reasonable," they claim a right under the section to prevent the plaintiffs not only from making connections, but from coming within the railway fence for any purpose whatever without their permission, including such purposes as patrolling the line of the Vehár main for inspection and control, and entering the sluice-house, which is admittedly municipal property. It is difficult to see how the

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right of access to municipal water-works for purposes of inspection and the like conferred by the express terms of section 263 of Act III of 1888, can be overridden by a section in Act IX of 1890 [illegible] exclusively to the making of accommodation [illegible].

I [illegible] that there are two answers to Mr. Russell's contention. In the first place, I agree with Mr. Inverarity's argument that, assuming the proposed connections to be "further accommodation works" within the meaning of section 12, that section is merely enabling and permissive, and not prohibitive. It gives particular right to a local authority as against a Railway Administration, but does not thereby impliedly abolish any [illegible] right vested in the local authority by any other enactment. What it does is, in effect, to give the plaintiffs, as regards railway land, an additional and not a substituted right, so that they might, at their option, either themselves make the connections under sections 262, 263, 265 and 222 of Act III of 1888, or require the defendants to make them under section 12 of Act IX of 1890. The provisions of section 12 would only be obligatory upon a local authority desiring further accommodation works and not having any independent power, such as the power created by Act III of 1888, for the purpose. That this view is correct, follows, I think, from the wording of section 12, which in terms only confers a power on the local authority and does not purport to take away any other power or duty existing [illegible]. There is nothing inconsistent with it in section 8. It is [illegible] enough that a local authority should be empowered, subject to certain conditions and for the purposes of its own Act, to lay pipes under railway as well as under other land, and that nevertheless the Railway Administration should be authorized, for the purpose of exercising the powers conferred upon it by Act IX of 1890, to alter the position of any such pipe, subject to the local authority's superintendence.

In the second place, the proposed connections are not, in my opinion, "further accommodation works" within the meaning of section 12 of the Indian Railways Act. They are a public work for which, under the section, a local authority might require accommodation works to be made. In the case of a local au-

thority desiring to construct a public road or other work a
under, or over a railway, the accommodation works
must obviously be works other than the public
structed; there must be, first, a public
is desired by the local authority, and,
to be made for its commodious use. A local
to make only a public road cannot require the
nistration to make the road as
the local authority may require
make, is not the road or other public work, but
works for its commodious use.
made by the local authority
In the present case, what is the public
authority "desires to construct" under
nections, by means of pipes between
Road and Tánsa mains. What, then,
works required for the commodious use
None. No work other than the
templated. It follows that no accommodation
tion here, and that section 12 does not apply.
"accommodation works" simply, but "further
works" that the section provides for.
modation works" must mean the same thing
section; must have the same meaning whether the
the Railway Administration is made by the
mentioned in the opening words of the section or by
Government or a local authority. The word
and also in connection with the opening words,
reference to section 11, to which section 12 is
which the term 'accommodation works' is
Sections 11 and 12 of the Indian Railways Act are
of sections 68 and 71 of the Railways Clauses Consolidation
Act, 1845 (8 and 9 Vic., c. 20), though section 71 refers only to
owners and occupiers, and not to local authorities desiring to
construct public works. It has been held that the "further"
works contemplated by section 71 do not mean any kind of
works which would at any time be convenient for the land-
owners, but works additional to accommodation works already

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right of access to municipal water-works for purposes of inspection and the like conferred by the express terms of section 263 of Act III of 1888, can be overridden by a section in Act IX of 1890 relating exclusively to the making of accommodation works.

It appears to me that there are two answers to Mr. Russell's contention. In the first place, I agree with Mr. Inverarity's argument that, assuming the proposed connections to be "further accommodation works" within the meaning of section 12, that section is purely enabling and permissive, and not prohibitive. It gives a particular right to a local authority as against a Railway Administration, but does not thereby impliedly abolish any independent right vested in the local authority by any other enactment. What it does is, in effect, to give the plaintiffs, as regards railway land, an additional and not a substituted right, so that they might, at their option, either themselves make the connections under sections 262, 263, 265 and 222 of Act III of 1888, or require the defendants to make them under section 12 of Act IX of 1890. The provisions of section 12 would only be obligatory upon a local authority desiring further accommodation works and not having any independent power, such as the powers created by Act III of 1888, for the purpose. That this view is correct, follows, I think, from the wording of section 12, which in terms only confers a power on the local authority and does not purport to take away any other power or duty existing *aliunde*. There is nothing inconsistent with it in section 8. It is reasonable enough that a local authority should be empowered, subject to certain conditions and for the purposes of its own Act, to lay pipes under railway as well as under other land, and that nevertheless the Railway Administration should be authorized, for the purpose of exercising the powers conferred upon it by Act IX of 1890, to alter the position of any such pipe, subject to the local authority's superintendence.

In the second place, the proposed connections are not, in my opinion, "further accommodation works" within the meaning of section 12 of the Indian Railways Act. They are a public work for which, under the section, a local authority might require accommodation works to be made. In the case of a local au-

thority desiring to construct a public road or other work across, under, or over a railway, the accommodation works required must obviously be works other than the public work to be constructed; there must be, first, a public work whose construction is desired by the local authority, and, secondly, works required to be made for its commodious use. A local authority desiring to make only a public road cannot require the Railway Administration to make the road as an accommodation work. What the local authority may require the Railway Administration to make, is not the road or other public work, but accommodation works for its commodious use. The public work itself must be made by the local authority under some other statutory power. In the present case, what is the public work which the local authority "desires to construct" under the railway? The connections, by means of pipes, between the Vehár and the Arthur Road and Tánsa mains. What, then, are the accommodation works required for the commodious use of the public work? None. No work other than the connections themselves is contemplated. It follows that no accommodation work is in question here, and that section 12 does not apply. Again, it is not "accommodation works" simply, but "further accommodation works" that the section provides for. The "further accommodation works" must mean the same thing throughout the section; must have the same meaning whether the requisition to the Railway Administration is made by the owner or occupier mentioned in the opening words of the section or by the Local Government or a local authority. The word 'further' in itself, and also in connection with the opening words, obviously has reference to section 11, to which section 12 is a rider, and in which the term 'accommodation works' is virtually defined. Sections 11 and 12 of the Indian Railways Act are modifications of sections 68 and 71 of the Railways Clauses Consolidation Act, 1845 (8 and 9 Vic., c. 20), though section 71 refers only to owners and occupiers, and not to local authorities desiring to construct public works. It has been held that the "further" works contemplated by section 71 do not mean any kind of works which would at any time be convenient for the landowners, but works additional to accommodation works already

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made by the Railway Company under section 68, and of the same kind as those which might be required under that section —*Rhondda and Swans e Railway Co.* v. *Talbot*[1]. In the present case, no accommodation works have been previously made by the Railway Company for the plaintiffs, and section 11 mentions no accommodation works resembling the connections which the plaintiffs propose to make. The connections are not water-courses or other passages of the kind described in section 11 (*b*), as Mr. Russell suggested. They are not, in my opinion, "further accommodation works" or accommodation works at all. Section 12 of the Indian Railways Act, 1890, therefore, does not exclude the right of the plaintiffs to enter on the defendants' land and to make the proposed connections which is given to them by Act III of 1888.

This decides the suit substantially in favour of the plaintiffs. I find on the first and fourth issues in the affirmative, and on the fifth and sixth in the negative. On the second and third I find that the Vehar main and the land west of the railway fence are vested in the plaintiffs, and the land between the main and the railway fence to the west in the defendants. The plaintiffs will have a decree for declaration and injunction in accordance with these findings, with costs.

The defendants appealed, contending that the lower Court was wrong in holding that the Corporation were entitled to enter upon their land without their permission.

The appeal was heard by Kershaw C. J., and Fulton, J.

Lang (Advocate General) and *Macpherson* for the appellants.

Scott and *Lowndes* for the respondents.

KERSHAW, C. J.:—The Court is of opinion that Mr. Justice Strachey's judgment is right and should be upheld. I need only shortly allude to what are the admitted facts of the case. They have been clearly stated by the Advocate General in his opening speech. It appears that a main of the Bombay water-works, through a portion of its course, lies along a narrow strip of land which may be accurately described as part of this railway. The plaintiffs think it necessary that there should be a

[1] (1897) 2 Ch., 131.

connection between one portion of this water-main and another portion of their water-mains in the city, and in order to carry this out, they desire to enter upon the land of the defendant Railway Company and to exercise what they consider to be the powers conferred upon them by the Municipal Act. An action in the nature of a friendly action was filed, it having been agreed to be taken for granted that the Corporation have entered upon the land and are prepared to carry out the proposed works. The action was instituted in the High Court and came before Mr. Justice Strachey, who decided that the Bombay Corporation were right. This Court is of opinion that Mr. Justice Strachey decided properly, and the reasons which lead us to that decision may be shortly stated.

By the combined operation of section 265 and section 222 of the Municipal Act, it may be said that, practically, the Corporation have the same rights with regard to carrying out their water-works as they have with regard to the carrying out of their drainage system. By section 265 it is provided: "The Commissioner shall have the same powers and be subject to the same restrictions for carrying, renewing and repairing water-main pipes or ducts within or without the city, as he has, and is subject to, under the provisions hereinbefore contained for carrying, renewing and repairing drains within the city." Turning back to Chapter IX it is seen that the Commissioner is associated with drainage and drainage works by section 221, which says: "The Commissioner shall maintain and keep in repair all municipal drains and when authorized by the Corporation in this behalf shall construct such new drains as shall from time to time be necessary for effectually draining the city." By section 222 it is laid down that "the Commissioner may carry any municipal drain through, across or under any street or place laid out as or intended for a street, or under any cellar or vault which may be under any street, and after giving reasonable notice in writing to the owner or occupier, into, through or under any land whatsoever within the city, or, for the purpose of outfall or distribution of sewage, without the city." Sub-section 3 of this section lays down: "In the exercise of any powers under this section, as little damage as can be shall be done, and compensa-

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tion shall be paid by the Commissioner to any person who sustains damage by the exercise of such power."

For the Railway Company it is said that the new pipe proposed to be laid through the twenty-two inches or thereabouts of this land is really a new drain within the meaning of section 221, and that, therefore, the Municipal Commissioner requires the sanction or authorization of the Corporation before he can lawfully and legally enter upon the work duties. The Court does not think it is necessary to decide that question. It is surrounded by a great many difficulties, and the real question which arises in this appeal may be decided without entering upon that question at all. It seems to us that what the Commissioner did as a matter of fact is well described by Mr. Justice Strachey when he says the Commissioner's action amounts to an alteration or extension of an existing water-main, which may be effected under one of the sections without the authority of the Corporation being given to him. By section 262 it is laid down: "The Commissioner shall manage all water-works belonging to the Corporation, and maintain the same in good repair and efficient condition, and shall cause all such alterations and extensions to be from time to time made in the said water-works as shall be necessary or expedient for improving the said works." Clearly the alteration and extension proposed is with a view to improving the said works, and no doubt it will have that effect when it is completed. Therefore, if the proposed work may be described as an alteration or extension of the existing work, it is an operation which can be carried out by the Commissioner without obtaining the authority of the Corporation at all.

It has been alleged by the defendants that there is no power in the Corporation to lay the new pipe on private land. We are of opinion that under section 265 as read with section 222 there is power to lay such a pipe under any land whatever in the city, and, therefore, there is no trespass by the Corporation, seeing that they have followed out strictly the lines of the Act which gives them the power.

Lastly, it is contended that even if the Corporation formerly had this power it is now controlled and taken away by section 12

of the Railways Act. It seems to us that, in order to take away a power of this kind which is so eminently serviceable and useful for a large Corporation like that of Bombay, it should be either taken away in express terms, which would leave no doubt about the matter, or the inference should be so strong as really to amount to taking away, in express terms, the power given by the Municipal Act. If we can see that both powers may be exercised together or separately, so that there is some reason why the two powers may co-exist side by side, it will go far to show that such inference cannot be drawn. We can understand why in the one case it would be for the advantage of both the Railway Company and the Corporation that the Railway Company should have the right to do the work. We can also see that there may be circumstances in which it would be for the advantage of both that the Corporation should do it. Supposing that a street has to be carried under a railway, it would be for the advantage of all that the Railway Company should do it, but when, on the other hand, we come to a work like water-works it should be done by the Corporation, who have the whole scheme of the supply of water to the city in hand. I see nothing in section 12 which by express words takes away the power given by the Municipal Act, or in any way repeals it. I see no irresistible inference to be drawn from section 12, which takes away such power, and we are of opinion that Mr. Justice Strachey was right when he said the two powers might well co-exist side by side, and that there is no abrogation by section 12 of the Railways Act of the powers previously given to the Corporation.

I do not think it necessary to enter into a discussion with regard to what are further accommodation works, because the case scarcely turns upon that point. It seems to me that the Court can decide the appeal on the broad grounds of the reasons given. The order of this Court is that Mr. Justice Strachey's decision be confirmed with costs.

Decree confirmed.

Attorneys for the plaintiffs:—Messrs. *Crawford, Brown and Co.*

Attorneys for the defendants:—Messrs. *Little and Co.*

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898. *August 8.*

SAKHARAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DEVJI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu law—Joint family—Manager—Debt contracted by a manager for family purposes—Decree against the managing member alone—Sale in execution of such decree—Effect of such sale.

Where a debt is incurred by a Hindu as manager of the family for family purposes, the other members of the family, though not parties to the suit, will be bound by the decree passed against him in respect of the debt; and if in execution of the decree any joint property is sold, the interest of the whole family in such property will pass by the sale.

SECOND appeal from the decision of C. H. Jopp, District Judge, Ahmednagar.

Suit for redemption. The plaintiffs were three brothers living together as members of a Joint Hindu family. Devji Antoba (plaintiff No. 1) was the manager.

The land in question was family property. In 1867, Devji as manager of the family mortgaged it with possession to Kakaji for family purposes.

In 1873, Kakaji sued Devji alone and obtained a money decree against him in respect of another debt, in execution of which his right, title and interest in the mortgaged lands was put up to sale in 1876, and was purchased by Kakaji himself.

Kakaji remained in possession of the lands till his death in 1885, when it passed into the possession of his brothers, defendants Nos. 2 and 3, and of his nephew, defendant No. 4.

In 1896, plaintiffs filed the present suit to redeem the lands from the mortgage of 1867.

Defendant No. 1, the widow of Kakaji, did not defend the suit, nor did defendant No. 3.

Kakaji's brother and nephew (defendants Nos. 2 and 4) contended that the whole interest of the family in the land had passed to Kakaji by the sale in execution, and that the plaintiffs had no right to redeem.

* Second Appeal, No. 89 of 1898.

The Subordinate Judge held that the mortgage-debt had been satisfied out of the rents and profits of the mortgaged lands, and that the effect of the Court sale was to pass Devji's interest in the land to the purchaser Kakaji. But he held that the shares of Devji's two brothers (plaintiffs Nos. 2 and 3) were not affected by the execution sale, and as the mortgage-debt had been already satisfied, he awarded them possession of their two-thirds share jointly with defendants Nos. 2 and 4.

In appeal, the District Judge held that plaintiffs Nos. 2 and 3 as owners of two-thirds of the equity of redemption were entitled to redeem the whole of the property, even though the mortgagee (Kakaji) had acquired a share in the equity of redemption; and as the mortgage-debt had been satisfied, he passed a decree awarding possession of the whole of the lands in dispute to plaintiffs Nos 2 and 3. His reasons were as follows:—

"I do not decide whether the plaintiffs' family remained joint at the date of the decree and of the auction-sale, whether Devji (plaintiff No. 1) was then manager, or whether the debt was one for family purposes, and binding on all the members of the joint family. Even if these points are decided in favour of defendants, Kakaji would still have acquired the share of Devji only in the lands by his auction-purchase. If Kakaji had wished to make the shares of all the members of the joint family liable for the debt, he should in the suit of 1873 have joined all the members of the family as parties to the suit, or at any rate he should have sued Devji as representative of the family. It must, therefore, be concluded that Devji was not so sued, and as Kakaji chose to sue Devji alone and not as the representative of the family, the execution of his decree took place against Devji only, the decree could not be, and was not, enforced against the other members of the family, and Devji's interest alone passed to Kakaji under the auction-sale—Mayne's Hindu Law, para. 324; *Deendyal* v. *Jugdeep* [1]; *Maruti* v. *Lilachand* [2]; *Kisansing* v. *Moreshwar*[3]. *Bhanu* v. *Chindhu*[4] does not apply, for the debt in that case was contracted by the father as well as by the other members of the family. I find that Kakaji purchased Devji plaintiff No. 1's interest only at the auction sale."

Against this decision defendants preferred a second appeal to the High Court.

N. G. Chandavarkar for appellants.

M. B. Chaubal for respondents.

(1) (1877) 4 Ind. Ap., 247.
(2) (1882) 6 Bom., 561.
(3) (1882) 7 Bom., 91.
(4) (1896) 21 Bom., 643.

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RANADE, J.:—The District Judge has refused to enquire "whether the plaintiffs' family remained joint at the date of the decree and of the auction-sale, whether Devji was then the manager, or whether the debt was one for family purposes, and binding on all the members of the joint family," because he thinks that, as the suit on the bond was brought against no other member of the family than Devji, and he even was not sued as the representative or manager of the family, the decree could not be enforced against the other members of the family, and that Devji's interest alone passed to Kakaji under the auction-sale. No doubt Mayne in his work on Hindu Law, section 324, does lay down this proposition: "If the managing member of the family executes a document which would bind the other members, the proper course is to sue them all. If the creditor chooses, he may only sue the person who executed the document. But if he adopts this course, his execution will only take effect upon the share of the execution debtor. He cannot enforce it against the other members (not being the sons of the debtor) merely by proving that the transaction was entered into for the benefit of the family." Numerous cases decided by this Court, however, show that the statement is not now quite accurate, and that there seems to be no difference between the case of sons and that of other members of the family. In *Hari* v. *Jairam*[1] the plaintiffs were brothers one of whom alone had been sued, yet the contention of the others, that they were not bound by the Court-sale as they were not parties to the suit, was held to be untenable on the authority of the Privy Council decision in *Daulat Ram* v. *Mehr Chand*[2]. In *Vishnu* v. *Venkatrav*[3] it was decided also, on the authority of *Daulat Ram's* case, that if the debt was incurred by Sankraji and Harji as the managers of the family, and for a family purpose, the interest of Venkatrav, their brother, might pass, although he was not a party to the suit. In *Vasudev* v. *Krishna*[4] the interests of a brother again were at stake, and it was held that the decision depended upon whether the decree obtained by the plaintiff against Thána Náik was for a debt incurred by Thána Náik as manager of the family for the pur-

(1) (1890) 14 Bom., 597.
(2) (1887) 15 Cal., 70.
(3) P. J. for 1889, p. 248.
(4) P. J. for 1891, p. 18.

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poses of the family. To the same effect is the decision of the Calcutta High Court in *Sheo Pershad Singh* v. *Saheb Lal*[1], in which the head-note runs thus: "the sale having been under a decree in respect of a joint debt of the family, the whole interest of the family in the properties in dispute passed at the sale, although L and S only out of the members of the family were sued." We, therefore, frame these issues—

(1) Whether the debt for which the decree was passed was contracted by Devji as the manager of the family and for a family purpose?

(2) Whether the interests of the plaintiffs Nos. 2 and 3 were attached and sold in execution of the decrees? and

(3) If so, whether it is open to the defendant in the present suit to contend that he is still possessed of their interests?

(This last issue, we may remark, is framed at the request of the pleader for the respondent in relation to point 3 in Appeal No. 109 of 1897.)

We ask the Judge to certify his findings on the above issues within two months.

(1) (1892) 20 Cal, 473.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

1898.

August 11.

KOTRABASSAPPAYA (ORIGINAL DEFENDANT), APPELLANT, *v.* CHENVIRAPPAYA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS *

Specific Relief Act (I of 1877), Sec. 39—Limitation Act (XV of 1877), Sch. II, Art. 91—Suit to cancel a void or voidable instrument—Reasonable apprehension of serious injury—Limitation.

Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it cancelled. The test is "reasonable apprehension of serious injury." Whether that exists or not, depends upon the circumstances of each case. It cannot be laid down, as a rule of law, that in no case can a man, who has parted with the property in respect of which a void or voidable instrument exists, sue to have such instrument cancelled.

* Second Appeal, No 172 of 1898.

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KOTRABASSAPPAYA v. CHINTIRAPPAYA.

Iyyappa v. *Ramalakshmamma* [1] referred to.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár, reversing the decree of E. S. Kulkarni, Subordinate Judge of Ránebennur.

Suit under section 39 of the Specific Relief Act (I of 1877) to have a document declared cancelled.

The plaintiff was the swámi of a math. He had become old and blind, and had no *shishya* (disciple) to succeed him. On the 13th August, 1892, he executed a *punmapatra* to the defendant appointing him manager of the properties of the math, and making them over to him as such manager, upon certain terms as to service and upon condition that he should give his son, if he should have one, to the plaintiff as his *shishya* (disciple), or if he had not, that he should select a *shishya* for the plaintiff. It further provided that, in case the defendant failed to act according to its terms, he should have no right over the property.

The following extract from the judgment of the District Judge gives a summary of the contents of the *punmapatra*:—

"As the decree to be passed in this case depends almost entirely on the construction placed on Exhibit 1-5, I will summarize it in English.

"It is described as a *punmapatre* passed on the 13th August, 1892, by Chenvirappa, Guru, to Kotrabasappa bin Bishingappa, and after giving a list of the property recites that the said property is made over to Kotrabasappa for the performance of the worship in the temples of the math the terms of agreement being as follows. Paragraph 1 stipulates that if Kotrabasappa should have a male child within two years two that child was to be made the guru's *shishya* or disciple, failing to have a child, Kotrabasappa was to find a *shishya* somewhere else to succeed plaintiff No. 1 in the math.

"Paragraph 2 requires defendant to feed and clothe the *shishya* and paragraph 3 to feed and clothe the succeeding *shishyas* chosen by this one. Paragraph 4 authorizes defendant to deal with the tenants of the land and paragraph 5 to pay the assessment, and so enjoy the property from generation to generation. Paragraph 6 states that the math and lands are to be kept in repair.

"Paragraph 7 states that the khâta was to be entered in the name of the *shishya*, and never in that of defendant or his successors.

"Paragraph 8 states that, in case of defendant's failing to live in the math and keep the property in repair, he is to have no right to the property.

"Paragraph 9 provides that defendant should feed and clothe plaintiff.

(1) (1896) 13 Mad., 549.

"Paragraph 10 states that neither plaintiff No. 1, nor his successors, nor defendant or his successors, should have any power to alienate the property.

"Paragraph 11 requires defendant to act as required above, to manage the property from generation to generation, and render service to the guru and future gurus in matters of worship If defendant failed to act as required above, he was to have no power or right over the property, but plaintiff No. 1 and succeeding gurus were to have it.

"It thus appears that the guru, who was at the time seriously ill, contemplated obtaining a successor to himself through defendant. Defendant was to serve the succeeding *maris*, and was to manage the land for their benefit, but was to have no right in it himself or his successors. Plaintiff No. 1 expected the arrangement to be permanent and last for generations, but, if defendant failed to do what was required of him, he was to have no right over the property."

On the 18th June, 1894, the plaintiff Chenvirappa sold the same properties to one Rudrapayya for Rs 2,000. The deed of sale recited the above *jimmapatra*, but stated that the defendant had failed to act according to its terms.

On the 13th August, 1895, the plaintiff Chenvirappa filed this suit under section 39 of the Specific Relief Act (I of 1877), praying for a declaration that the *jimmapatra* was void, and that it might be delivered up to be cancelled. He alleged that the defendant had failed to act according to its terms; and that he (the plaintiff) had, therefore, cancelled and set it aside and had sold the property to Rudrappaya; that he was apprehensive that, if the *jimmapatra* was allowed to remain in the defendant's possession, injury might be caused to him (the plaintiff) and to the math, and he, therefore, brought this suit.

The defendant pleaded (*inter alia*) that the plaintiff had no right to sue; that he was in possession of the property as owner, and he denied that he had violated the terms of the *jimmapatra*.

On the 13th July, 1896, on his own application Rudrappayya was joined as co-plaintiff in the suit.

The Subordinate Judge held that the plaintiff had no right to bring the suit, and he, therefore, dismissed it.

On appeal by the plaintiff the District Judge reversed the decree, and passed a decree for the plaintiff, directing that the *jimmapatra* should be delivered up and cancelled.

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KOTRABAS-SAPPAYA v. CHENVIRAP-PAYA.

The defendant preferred a second appeal.

Scott and *Shamrao Vithal*, for the appellant (defendant).—Under the *jimmapatra* the plaintiff gave us possession. Subsequently he sold the property to the second plaintiff, and yet he brought the suit in his own name only. We contend that the plaintiff had then no interest in the property and was not entitled to sue *Iyyappa* v. *Ramalakshmamma*(1). Further, there is no cause of action disclosed in the plaint. The plaintiff says that possession was not given to us. If so, then no cause of action has accrued to him. But, as a matter of fact, possession was given to us as found by both the lower Courts, and we submit that there are no circumstances in the case which would entitle the plaintiff to set aside the document. A deed can only be set aside under the circumstances mentioned in section 39 of the Specific Relief Act. We say that we are the owner, because the property is conveyed to us from generation to generation.

The next point is as to limitation. The suit as originally brought was not properly constituted. We submit that the subsequent addition of the second plaintiff did not cure the defect. Plaintiff No. 2 had the right to bring the suit, and when he was put on the record, four years had elapsed since the *jimmapatra* was executed. The suit is, therefore, clearly time-barred—*Hasan Ali* v. *Nazo*(2); *Janki Kunwar* v. *Ajit Singh*(3). Further, the suit cannot be maintained, because the plaint does not contain a prayer for consequential relief.

Macpherson and *Narayan G. Chandavarkar* appeared for the respondents (plaintiffs).—Under the *jimmapatra* the defendant was not to be the owner, but merely a manager. The first plaintiff is still the swámi of the math and is, therefore, interested in the property. At the most, the *jimmapatra* was an absolute conveyance subject to defeasance on defendant's failure to carry out the conditions mentioned therein. As to the joinder of the second plaintiff, we say that he is not barred by limitation. He has three years from the time at which the facts of the case became known to him. He was put on the record within three years of his put-

(1) (1890) 13 Mad., 549. (2) (1839) 11 All., 456
(3) (1887) 15 Cal., 58.

chase. Both the lower Courts have found that the defendant was put in possession. This is a finding of fact and it is binding in second appeal.

FARRAN, C. J.:—The original plaintiff in the suit, out of which this second appeal arises, sued to have it declared that a *jimmapatra* which he had passed in favour of the defendant on the 13th August, 1892, had been cancelled. The plaint was filed on the 13th August, 1895. The suit in the lower Courts has been treated as a suit to cancel or set aside an instrument not otherwise provided for, and as falling within the scope of article 91 of the second schedule to the Limitation Act, and such is doubtless its true nature. The period, within which it must be brought, is, therefore, three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him.

The original plaintiff was the swámi of a math. He had become old and blind and had no *mari* to succeed him. The *jimmapatra* which he executed in favour of the defendant need not be referred to in detail. In effect it appointed the defendant manager from generation to generation of the properties of the math upon certain conditions as to service, and provided that the defendant should give his son, if one should be born to him within a year or two, to the original plaintiff as his '*mari*', or in default of such a son should select a '*mari*' for the said plaintiff. It also provided that, in the event of the defendant failing to act according to its terms, the defendant should have no right over the property.

Subsequently on the 18th June, 1894, the original plaintiff by a sale deed of that date (Exhibit 124) reciting the above *jimmapatra*, and further reciting that the defendant had failed to act according to its terms, sold the properties of the math to the second plaintiff for the sum of Rs. 2,000. The second plaintiff was by amendment added as a plaintiff on the record on the 13th day of July, 1896. If the original plaintiff is not entitled to maintain the suit, the claim of the added plaintiff to sue would appear to have been time-barred at the time when he was added as a plaintiff to the suit.

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The first question which we have to consider, therefore, is whether the original plaintiff, under the circumstances of the case, was entitled to bring the suit. The law upon this subject is contained in section 39 of the Specific Relief Act, which enacts that "any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable." The District Judge considered that the original "plaintiff naturally thought it most dangerous to leave such a document (as the *jimmapatra*) in the hands of a man who was actually in possession of the lands as manager," and held that he was entitled to sue. We do not dissent from his view. It appears to us that, if the document is not cancelled, the added plaintiff, the purchaser, may sue the original plaintiff for a return of his purchase-money, if he cannot get possession of the lands by reason of the defendant holding them under the *jimmapatra*, and that thus the original plaintiff may have had reasonable apprehension of permanent injury. He was also in danger of the defendant suing him in respect of the lands of which the defendant had not obtained possession, for it does not appear that the defendant has obtained possession of all the lands; and there is, lastly, the suggested risk that the added plaintiff may not act fully up to the terms of his purchase and that the original plaintiff may be in a position to resume the lands. As to the judgment in *Iyyappa* v. *Ramalakshmamma*[1], which has been relied on for the appellant, we are not prepared to follow it if it was intended to lay it down, as a rule of law, that in no case can a man, who has parted with the property, in respect of which a void and voidable instrument exists, sue to have such instrument cancelled. The decision in the Madras case may be correct with reference to the facts before the Court, but we think that we ought not to depart from the wording of the section which we have quoted, or to add to it a condition which is not to be found in the section itself. The test is "reasonable apprehension of serious injury." Whether that exists or not, must depend upon the circumstances of the particular case with which the Court has to deal. In this view the question of limitation does not

(1) (1890) 13 Mad., 549.

arise. The suit was brought by the original plaintiff within three years of the date of the *jimmapatra*. Mr. Scott also contends that as the plaint averred that the defendant had not got possession of the lands, the defendant could not have broken the conditions of the *jimmapatra*, and that the suit must, therefore, be dismissed, even though the Courts have found that such averment has not been supported. We cannot allow this peculiarly technical argument to prevail. The plaint also averred that the defendant after the execution of the document began to act improperly, and not in accordance with its conditions. This averment the written statement traversed. We think that an issue should have been framed by the Court of first instance on this averment and traverse, which raised in fact the main issue between the parties.

Strangely enough, though the Court of first instance found that the defendant had obtained possession, in part at least, of the lands, the appellate Court did not raise an issue as to whether the original plaintiff was entitled to cancel the *jimmapatra* by reason of the defendant having broken its conditions, but that Court dealt with the appeal as if that issue had been before it. Its judgment on this point is as follows :—

"Defendant seems to have mistaken his position altogether, and almost as soon as the document was registered he discontinued attendance at the math and the personal service of plaintiff No. 1. Differences arose almost immediately, and finally plaintiff No. 1 sold the property and math by Exhibit 126 to plaintiff No. 2. How great was defendant's misapprehension is shown even by the pleadings in the case. * * * Defendant does not in his written statement attempt to make out that he did his duty and was entitled to remain in possession and retain his title-deed. He merely raised technical pleas and pleaded that under the terms of the deed he was in possession as owner. No further justification is needed for this suit."

There has been no ground of appeal to this Court directed particularly against that finding, but the grounds of appeal generally involve it. The District Judge has misread the pleadings and has based his finding upon the assumption that the defendant did not aver that he had acted up to the agreement. If he had raised a formal issue, the parties would have argued it, and he possibly would not have fallen into this error. We must send down the issue :—"Was the original plaintiff entitled

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to cancel the *jimmapatra* by reason of the defendant's non-observance of its conditions or for any reason?"

The District Judge to be at liberty, if he considers it necessary, to record fresh evidence. Findings to be certified within two months.

Issue sent down.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898. *August* 16.

RAMCHANDRA (ORIGINAL PLAINTIFF), APPLICANT, *v.* GANESH (ORIGINAL DEFENDANT), OPPONENT.*

Civil Procedure Code (Act XIV of 1882), Sec 25—"Court of Small Causes"—Meaning of the expression—A Court invested with Small Cause Court powers not a Small Cause Court within the section—Appeal.

The expression "a Court of Small Causes" in the last clause of section 25 of the Code of Civil Procedure (Act XIV of 1882) means a Court properly and strictly so called, and does not include a Court invested with the jurisdiction of a Court of Small Causes.

Mangal Sen v. *Rup Chand* [1] dissented from.

APPLICATION under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiffs filed a suit to recover Rs. 49-15-11 as their share, for the years 1890-91, of the profits of a khoti village from the defendant, who was the managing khot.

The suit was originally filed in the Court of the First Class Subordinate Judge at Ratnágiri, who was invested with the jurisdiction of a Judge of a Court of Small Causes under section 28 of the Bombay Civil Courts Act (XIV of 1869).

The suit was afterwards transferred to the Court of the Assistant Judge by the District Judge under section 25 of the Civil Procedure Code (Act XIV of 1882).

The Assistant Judge passed a decree for the plaintiff.

On appeal the District Judge reversed the decree and rejected the plaintiff's claim.

*Application, No. 72 of 1898.

(1) (1891) 13 All., 324.

Thereupon the plaintiffs applied to the High Court, under its revisional jurisdiction, to set aside the District Judge's decision, contending that the suit was cognizable by a Court of Small Causes and that it was filed in the Court of a Subordinate Judge invested with Small Cause Court powers, and that although it was transferred to the Court of the Assistant Judge, such transference did not alter its character, and the Court to which it was so transferred should be regarded as a Court of Small Causes, and from the decree of such a Court no appeal lay to the District Judge.

A rule *nisi* was granted calling upon the defendant to show cause why the District Judge's decree should not be set aside as *ultra vires*.

Mahadev V. Bhat, in support of the rule:—The decree of the Assistant Judge was final, and no appeal lay to the District Judge. He had, therefore, no jurisdiction to reverse the decree in appeal —*Mangal Sen* v. *Rup Chand*[1].

PARSONS, J.:—The contention on behalf of the applicant (original plaintiff) is that there was no appeal from the decree passed by the Assistant Judge, since his Court trying this suit must be deemed to have been a Court of Small Causes. There is no appearance on behalf of the defendant.

The facts are these:—The suit, which is said by the applicant to have been (and for present purposes we assume that it was) of a nature cognizable by a Small Cause Court, was filed in the Court of the Subordinate Judge, First Class, who was invested with the jurisdiction of a Judge of a Court of Small Causes up to Rs. 500 under section 28 of the Bombay Civil Courts Act, 1869. The District Judge, under section 25 of the Code of Civil Procedure, transferred the suit to the Court of the Assistant Judge, and the latter tried the suit and passed a decree in favour of the plaintiff. The defendant appealed to the District Court and obtained a reversal of that decree.

The argument that no appeal lay from the decree of the Assistant Judge is based on the last clause of section 25 of the Civil Procedure Code: "The Court trying any suit withdrawn

(1) (1891) 13 All., 324.

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under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes." The answer depends upon whether a Court invested with the jurisdiction of a Court of Small Causes is a Court of Small Causes within the meaning of that section. In our opinion, it is not. A Court of Small Causes is defined in the Provincial Small Cause Courts Act, 1887, to mean a Court of Small Causes constituted under that Act, but the Court of the Subordinate Judge is not such a Court. The Act, moreover, throughout draws a marked distinction between a Court of Small Causes and a Court invested with the jurisdiction of a Court of Small Causes which is totally opposed to the idea that they were intended to be one and the same, and both come under the definition of Court of Small Causes (see for instance section 32 and section 35). There is no definition in the Civil Procedure Code of Courts of Small Causes, but section 5 mentions "Courts of Small Causes constituted under Act XI of 1865," and also "all other Courts exercising the jurisdiction of a Court of Small Causes." If the expression "Courts of Small Causes" were intended, whenever it was used in the Code, to include both, there was no necessity for this separate mention of the two classes of Courts. We construe the expression Courts of Small Causes in section 25 to mean Courts properly and strictly so called, and not to include Courts only invested with the jurisdiction of Courts of Small Causes. This point does not seem to have attracted the attention of the learned Judges who decided the reference in the case of *Mangal Sen* v. *Rup Chand*[1]. As long ago, however, as 1883 it was ruled by this Court that "the Courts of Subordinate Judges invested with the jurisdiction of a Judge of a Small Cause Court under section 28 of Act XIV of 1869, do not thereby become 'Courts of Small Causes constituted under Act XI of 1865.' They merely exercise a similar jurisdiction": see *Bhagvan* v. *Bala*[2]. We discharge the rule.

(1) (1891) 13 All., 324.

(2) (1883) 8 Bom., 230

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr Justice Ranade.

LAKSHMAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* GOPAL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS *

1898. *August* 18.

Partition—Co sharer—Mortgage by co-sharer of undivided share—Partition suit subsequently brought by other co sharer to which mortgagee not a party—Mortgaged property allotted to a sharer other than mortgagor—Rights of such co-sharer—Partition re opened—Fraud of mortgagor and mortgagee

Four brothers, *viz.*, Damodar, Lakshman, Balvant and Parashram, were joint owners of certain land. For purposes of convenience each was in possession of a certain portion, but there was no formal partition. The particular land in question in this suit (Pot Nos. 1 and 2 of Survey No. 174) was a part of the land in possession of Balvant. In 1867, without the knowledge of his brothers, Balvant mortgaged these plots of land to the first defendant for Rs. 2,800. In 1886 Damodar sued for partition of the whole property, and in 1891 Lakshman brought a similar suit By the decrees in these suits, Pot No. 1 was allotted to Damodar and Pot No. 2 was awarded to Lakshman. The mortgagee was not a party to either suit, the plaintiffs in these suits (as found by the High Court) having had no notice of the mortgage. Damodar and Lakshman, on attempting to get possession of the lands allotted to them respectively by the partition decrees, were obstructed by the mortgagee, and now brought these suits against him and the heirs of Balvant (defendants Nos. 2—9), claiming possession of the lands allotted to them free of the mortgage-debt, or that the partition should be re-opened, and that unencumbered land should be allotted to them and the mortgaged land given to Balvant's branch of the family (defendants Nos. 2—9).

Held, that the partition should be re opened and the mortgaged land assigned to the defendants Nos. 2—9.

Where a co sharer of joint property has mortgaged his share without the knowledge of his co-sharers, and there has subsequently been a partition suit to which, through the fraud of the mortgagor and the mortgagee, the latter has not been made a party, he (the mortgagee) will only be allowed to proceed for the recovery of his mortgage-debt against that portion of the property which has been allotted to his mortgagor.

Hem Chunder v. *Thako Monie Dbi*[1] approved

CONSOLIDATED second appeals from the decision of Ráo Bahádur N. G. Phadake, Joint First Class Subordinate Judge, A. P., at Poona.

* Second Appeals, Nos. 111 and 112 of 1897.

(1) (1893) 20 Cal., 533.

1898.

LAKSHMAN v. GOPAL.

The plaintiffs in these two suits sued to recover possession of certain lands (Pot Nos 1 and 2 of Survey No. 171) under the following circumstances :—

These lands were situated in the village of Govitri, the whole of which was the joint family property of four brothers, *viz.*, Damodar, Lakshman, Balvant and Parashram. By arrangement among themselves each had a portion of the property in his possession and management, but there had never been any formal partition. The lands in question (Pot Nos. 1 and 2) were a part of the land in the possession of Balvant.

In 1867 Balvant, without the knowledge of the plaintiff, mortgaged Pot Nos. 1 and 2, together with other land, to Gopal Vasudev Barve (defendant No. 1) for Rs. 2,800 with possession.

In 1886 Damodar brought a partition suit to recover his share of the whole village, and obtained a decree in 1887, by which, with other land, Pot No. 1 of Survey No. 174 was awarded as his share. To this suit the mortgagee (defendant No. 1) was not made a party, and the High Court found that at the date of suit the plaintiff had no notice of the mortgage.

In 1891 Lakshman brought a similar partition suit for his share and obtained a decree, which awarded him (*inter alia*) Pot No. 2 of Survey No. 174. The first defendant (the mortgagee) was not a party to this suit either, the plaintiff (as found by the High Court) having then no notice of the mortgage.

In execution of their respective decrees, Damodar and Lakshman endeavoured to obtain possession of Pot Nos. 1 and 2 of Survey No. 174, and being obstructed by defendant No. 1 (mortgagee) they applied under section 328 of the Civil Procedure Code (Act XIV of 1882) to have the obstruction removed; but their applications were refused under section 332.

Lakshman thereupon now sued to recover Pot No. 1 and Damodar sued to recover Pot No. 2. In both suits the first defendant was the mortgagee, the other defendants (Nos. 2 to 9) were the heirs of the mortgagor Balvant. In each suit the plaintiff prayed as follows :—

(*a*) for possession of the land sued for free from any mortgage lien, or

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(*b*) that the land sued for should be given over to the defendants Nos. 2 to 9 (the sons and heirs of Balvant) and in their stead other unencumbered lands should be given to the plaintiff out of the lands that had been allotted to the share of Balvant in the partition suits, or

(*c*) that the plaintiff should be allowed to pay off the mortgage-debt in proportion to the value of the land claimed by him, and that the sum so paid should be made a charge on the lands allotted to Balvant's branch of the family.

The Court of first instance dismissed both suits, holding that neither plaintiff could recover the land he sued for without paying off the whole of the mortgage-debt due to defendant No. 1 (the mortgagee).

This decision was confirmed, on appeal, by the First Class Subordinate Judge, A. P., at Poona.

Thereupon the plaintiffs preferred second appeals to the High Court. The appeals were consolidated and heard together.

M. B Chaubal (with him *P. P. Khare*) for appellants (plaintiffs) :—The lands in dispute were joint family property. They were mortgaged by Balvant without plaintiffs' knowledge or consent. It is not pretended that the mortgage was effected for family purposes. That being so, the mortgage is not binding on the plaintiffs. A person taking a mortgage of joint property from one co-sharer takes it subject to the rights of the other co-sharers —*Byjnath Lall* v. *Ramoodeen*[1]. The lands in question have now been allotted to the plaintiffs by the partition decrees, and the plaintiffs are entitled to recover them free from the mortgage-debt. The lower Court finds that the mortgagor as well as mortgagee fraudulently kept the plaintiffs in ignorance of the mortgage This acccounts for the fact that the mortgagee was not made a party to the partition suits. If the plaintiffs had been aware of the mortgage, they would have made the mortgagee a party to the suit. And in that case the Court, in decreeing partition, would have divided the family property among the co-parceners so as to allot the mortgaged lands to the share of the mortgagor : see *Pandurang* v. *Bhasker*[2]; *Udaram* v. *Ranu*[3].

(1) (1874) 1 I. A., 106. (2) (1874) 11 Bom. H. C. Rep, 72.
(3) (1875) 11 Bom. H. C. Rep., 176.

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What the Court would have done then, ought to be done now, especially as it is found, as a fact, that both mortgagor and mortgagee fraudulently concealed the mortgage. The plaintiffs are, therefore, entitled to ask that the partition should be re-opened. The mortgaged property should be assigned to the heirs of Balvant, who mortgaged it, and in its place an unencumbered portion of the property of equal value should be given to plaintiffs—*Hem Chunder* v. *Thako Moni Debi*[1]. The mortgagee can only enforce his lien against the share of his mortgagors.

N. V. Gokhale for respondents (defendants):—The plaintiffs omitted to make the mortgagee (defendant No. 1) a party to their partition suits. They had full notice of the mortgage, for it was duly registered, and the mortgagee was in possession. That was sufficient notice to the plaintiffs and ought to have put them on inquiry. But they made no inquiry, and ignored the mortgage altogether. The partition effected by these suits was thus effected behind the back of the mortgagee (defendant No. 1). Such a partition cannot affect his rights. He cannot be treated as a trespasser, and must be paid his mortgage money before the plaintiffs can recover possession of the mortgaged lands. There is no evidence to show that the mortgagee has acted fraudulently or done anything to keep the plaintiffs in ignorance of the mortgage. The lower Court's finding on this point rests on mere surmise. The partition ought not, therefore, to be re-opened. The ruling in *Vinayak* v. *Ramkrishna*[2] applies to the present case.

PARSONS, J.:—In order to see what relief the parties to these consolidated appeals are entitled to, it will be necessary to set out the facts briefly.

The plaintiffs and the defendants Nos. 2 to 9 are the descendants of one common ancestor Dhondo. In several suits they obtained decrees for the partition of their ancestral estate, and in execution of those decrees the lands were divided off and the share of each separately assigned to him. Thus the plaintiff Lakshman got his ¼ share, the plaintiff Damodar got his ¼ share, the defendants Nos. 2 to 9 as the sons of Balvant got their ¼ share, and the other member Parashram got his ¼ share.

(1) (1893) 20 Cal., 533. (2) P. J., 1889, p. 180.

Among the lands assigned to the shares of the plaintiffs were Pot Nos. 1 and 2 of Survey No. 174. In taking possession of these fields, the plaintiffs were obstructed by the first defendant, who claimed to be in possession and to have the right of remaining in possession under a mortgage passed to him by Balvant. Orders having been passed adverse to the plaintiffs under section 332, they have now brought the present suits claiming either that they should be held entitled absolutely to the possession of the lands unencumbered by any mortgage lien, or that these lands should be assigned to the share of the defendants Nos. 2 to 9 and other unencumbered lands given to them out of the lands that have been assigned to the defendants Nos. 2 to 9.

The lower Courts have dismissed the plaintiffs' suits, holding that they cannot obtain possession of the lands, or any relief, unless they redeem the whole mortgage of the first defendant (which is for a large sum of money and covers not only the two pot numbers, the subject of these suits, but other lands also). The plaintiffs have appealed against this decree, and the first defendant alone has appeared before us to support it.

It is quite clear that the order is wrong. Balvant had power to mortgage his own share only in the ancestral estate, that is, one-fourth. According to the findings of the lower Courts, Balvant did no more than mortgage that share, and the shares of the plaintiffs were not at all affected by the mortgage, nor were the plaintiffs themselves in any way liable for the debt. It is impossible, therefore, to uphold the order that they are bound (before they can get possession of their own share of the lands) to pay a debt for which the sons of Balvant and their lands alone are liable. A proper provision would, of course, have been made for this mortgage charge, had the first defendant been a party to the partition suits, but he was not, and the whole of this litigation is due to this omission. Although the Subordinate Judge, A. P., is of opinion that the plaintiffs were not to blame for the omission, yet he has made them suffer for it by applying the case of *Vinayak* v. *Ramkrishna*[1]. I am of opinion that the principle of that case can only be applied where the partitioners combine together to ignore the existence of a mortgagee, and proceed to

(1) P. J., 1889, p 180.

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partition behind his back fraudulently with the object of defeating his just claim. I do not think it can apply to the present case where the Judge finds that the defendants Nos. 2 to 9 were guilty of fraud in deliberately withholding all information about the mortgage through spite towards the plaintiffs. He adds that the first defendant appears to have withheld himself behind the other defendants. If such a state of things, *viz.*, fraud and collusion between the mortgagee and his mortgagors, were proved, the proper rule to apply would be that laid down in *Hem Chunder* v. *Thako Moni Debi* (1). I cannot, however, say that this is proved. All that can be said is that the plaintiffs are perfectly innocent and brought their suits without any notice of the mortgage. In that case I think that the mortgagee, who has not been made a party to the partition suit, has still the right to the relief that he would have had, if and when he had been made a party to the suit, namely, to ask the Court to so divide the property as to assign, as far as possible, the property mortgaged to the share of his mortgagor. I do not think that he can possibly have any greater right. In a somewhat analogous state of things, a right of redemption is always preserved to a puisne mortgagee not made a party to a foreclosure suit.

For these reasons, and also on the general ground of the equitable relief that the plaintiffs are entitled to against the fraud of the defendants Nos. 2 to 9, we have come to the conclusion that they are entitled to demand that the defendants Nos. 2 to 9 shall take the property which they have burdened with a mortgage, and give them unencumbered property of a similar value, and that the first defendant cannot resist this demand or ask for any other relief. If, as may turn out to be the case, the mortgaged lands cannot be fully exchanged for other lands, he must bear the loss of the security of these lands, falling back upon the defendants Nos. 2 to 9 for his remedy, taking, as he did in mortgage, the share only of Balvant in the lands in suit.

We, therefore, vary the decree of the lower appellate Court and order that the partition that has been effected between the plaintiffs and the defendants Nos. 2 to 9 be re-opened, and that, as far as possible, Pot Nos. 1 and 2 of Survey No. 174 be assigned to the

(1) (1893) 20 Cal., 533.

share of defendants Nos. 2 to 9, and that in place thereof unencumbered land of a similar value to each pot number be given from their lands to the plaintiffs respectively. The plaintiffs must bear the costs of the first defendant and they can recover them and their own costs from the defendants Nos. 2 to 9.

RANADE, J.:—Both the lower Courts have held that the appellant (original plaintiff) was entitled to none of the reliefs claimed by him in this suit, and that his proper remedy was to bring a regular redemption suit against respondent No. 1 for an account of the mortgage of the land in dispute.

This land, together with other property, was mortgaged to respondent No. 1 by the ancestor of the other respondents Nos. 2 to 9, who were joint owners with appellant of the inám village of Govitri, where the land is situated. The facts are fully and correctly stated in the judgments of both the lower Courts; and it appears therefrom that the appellant has a 4-annas' share in the village, the remaining 12 annas were held in common by other sharers including appellant in Appeal No. 111 of 1898, and the respondents Nos. 2—9. The present appellant sued the other sharers for partition, in which suit the mortgagee (respondent No. 1) was not made a party. The appellant obtained a decree in 1887 by which Pot No 1 of the land in dispute was allotted to his share. Later on, some of the other sharers also brought a partition suit in 1891, and the decree therein settled their shares in the village, and, among others, Lakshman, the appellant in Appeal No. 111 of 1898, was allotted Pot No. 2 of this same land. When appellant in this appeal and Damodar, the appellant in Appeal No. 112 of 1898, went to take possession, they were resisted by the mortgagee (respondent No. 1), and his obstruction being upheld, these two appellants brought two separate suits claiming alternative reliefs, (1) actual possession of the two lands in dispute by the removal of the mortgagee's obstruction; or (2) a re-adjustment of the partition already made by an exchange for the lands in dispute of others of equal value out of those allotted to respondents Nos. 2—9's share. A third relief was also claimed for permission to pay off respondent No. 1's mortgage-debt in proportion to the value of the lands in dispute, with a declaration

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that the sum so paid should be made a charge on the shares allotted to respondents Nos. 2—9.

In so far as the first and third of these prayers are concerned, there can be no doubt that they were clearly inadmissible. A mortgagee of one of the co-sharers of joint property, who is not made a party to the partition suit brought by the sharers among themselves, cannot be ousted from his possession of any portion of the mortgage security unless his debt is fully paid off—*Vinayak* v. *Ramkrishna* (1). No arrangement between the sharers which ignores his mortgage can adversely affect his rights. In respect of these two reliefs, the appellant's only remedy was, as held by the Courts below, to bring a regular redemption suit, and to pay off the balance of the mortgage-debt.

The second prayer of the appellant-plaintiff, however, stands on a different footing, and the equities of the parties in regard to it do not appear to have been sufficiently considered by the Courts below. It must be noted in this connection that the village was admittedly held in common by all the sharers. The mortgage bonds recite this state of things in clear terms. Some of the sharers for reasons of convenience held possession of portions of the village lands, but this kind of possession by the ancestor of respondents Nos. 2—9 of the land in dispute conferred no rights on his mortgagee which were not controlled by the equities represented by the common ownership of all the sharers. As held by their Lordships of the Privy Council in *Bynath Lall* v. *Ramoodeen Chowdry* (2), where the owner of an undivided share in a joint estate mortgages his undivided share, he cannot by so doing affect the rights of the other sharers, and the mortgagee takes his security subject to the rights of those sharers to enforce a partition. In this case, where the mortgagor was allotted other lands for his share in a partition made by the Revenue authorities, the mortgagee was allowed to enforce his security on the lands so allotted, even though they did not form part of the original security. For the purpose of such re-adjustment, a partition once made is liable to be re-opened. The Courts below have distinguished this case on the ground that there was no possession given, while in the present case the mortgagee is in possession. This

(1) P. J. for 1869, p. 180. (2) (1874) 1 I. A., 106; 21 Cal. W. R., 233.

circumstance, however, does not appear to make any essential difference in the equitable rights of the parties, where, as in the present case, the estate was admittedly undivided and held in common. On the authority of the principal case noted above, the High Court of Calcutta held in *Sharat Chunder* v. *Hurgobindo*[1], that one co-sharer in a joint estate cannot deal with his share so as to affect the rights of the other co-sharers, and that the assignee of such co-sharer takes subject to those rights. In a later case decided by the same Court—*Hem Chunder* v. *Thako Moni Debi*[2]—a co-sharer had mortgaged his share in undivided property, and in a subsequent partition suit to which the mortgagee was not made a party, the mortgaged property was allotted to another co-sharer, and it was held that the mortgagee must enforce his debt against the property allotted to the share of his mortgagor. The mode in which this re-adjustment can be made is clearly laid down in *Ooma Dutt* v. *Hurnooman*[3]. These decisions seem clear on the point in dispute in the present appeal.

It is true that the rulings on this side of India about the necessity of joining mortgagees of co-sharers as parties to partition suits are stricter than appears to be the practice in Bengal—*Sadu* v. *Ram*[4]. This circumstance, however, in no way affects the equitable principles which must govern cases where a partition is effected without making the mortgagee-creditor of a co-sharer a party to the partition suit. Even in the case of an auction-purchaser of the interest of a co-sharer, it was held in *Mahabalaya* v. *Timaya* that he can take no more than the interest of the co-parcener as a member of a united family, and the manner in which the equitable adjustment and marshalling has to be made so as to give effect, as far as may be possible, to the rights of all parties, is laid down in *Pandurang* v. *Bhaskar*[5]. These equitable principles, which govern the rights of purchasers, equally govern the case of mortgagees—*Vinayak* v. *Ramkrishna*[7]. The circumstances of the case of *Sidasavant* v. *Balsavant*[8] were

(1) (1878) 4 Cal., 510.
(2) (1893) 20 Cal., 533.
(3) (1874) 22 Cal. W. R., 453
(4) (1892) 16 Bom., 608.
(5) (1875) 12 Bom. H. C Rep., A. C. J., 138.
(6) (1874) 11 Bom. H. C. Rep., 72.
(7) P. J. for 1889, p. 180.
(8) P. J. for 1893, p. 64.

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rather peculiar, but it is clear from the judgment recorded in that case that, as against the mortgagor-co-sharers who had redeemed their share, it was open to the plaintiffs in the partition suit to enforce their remedy by execution, even though they had failed to execute their decree against the mortgagee in possession.

On the whole, it appears to me that the appellant has a right to require the respondents Nos. 2—9 to take back the encumbered lands as part of the lands allotted to their shares, and in exchange make over to appellant land of equal value out of their share to make up his full share. This re-adjustment becomes more equitable in the present case, because, as held by the lower appellate Court, there is good reason to suspect that the mortgagee-respondent held back his claim fraudulently, and in collusion with the other respondents.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Ch. of Justice, and Mr. Justice Fulton.

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August 18.

MANAGER HANMANT SANTAYA PRABHU (ORIGINAL DEFENDANT), APPELLANT, *v.* SUBRABHAT (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), Sec. 244, 258—Agreement not to execute decree—Execution—Breach of agreement—Suit to recover damages.

The provisions of section 244 of the Civil Procedure Code (Act XIV of 1882) are no bar to a suit to recover damages for breach of a contract not to execute a decree.

APPEAL from a remand order passed by H. L. Hervey, District Judge of Kánara, against the decision of Ráo Sáheb T. V. Kalsulkar, Subordinate Judge of Honávar.

The plaintiff alleged that in 1889 the defendant had obtained a decree against him, and on the 26th June, 1891, agreed to accept Rs. 65 from him in full satisfaction of it; that he accordingly paid this sum and got a receipt from the defendant, who undertook to certify the same to the Court and promised not to claim any further sum under his decree. The defendant, however, did not certify the payment and subsequently applied for execution

* Appeal, No. 9 of 1898 from order.

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against the plaintiff, who was obliged to pay into Court the sum of Rs. 103-2-2.

The plaintiff, therefore, now sued to recover back this sum, together with certain costs incurred by him in resisting the plaintiff's application for execution.

The Subordinate Judge held that the suit was not maintainable in the form in which it was brought, and that the plaintiff's only remedy was to seek to recover the Rs. 65, alleged to have been paid by him to the defendant in 1891, with interest. He, therefore, without going into the merits of the case, rejected the claim.

On appeal by the plaintiff the Judge, having held that the form of the suit was not objectionable, reversed the decree and remanded the case for trial on the merits

The defendant appealed against the said order of remand.

Dattatraya A. Idgunji for the appellant (defendant) :—The alleged payment of Rs 65 cannot be taken to have satisfied the decree. The payment not having been certified as required by section 258 of the Civil Procedure Code (Act XIV of 1882), the Court executing the decree could not take notice of it All questions relating to the satisfaction of decrees are in the cognizance of the Court of execution See section 244 (*c*) of the Civil Procedure Code. By enforcing an uncertified adjustment of a decree, the provisions of that section would be nullified. The same result would follow if a suit for damages for breach of contract in such a case were allowed. The money actually paid may be recovered, but it cannot be recovered as money paid in satisfaction of the decree—*Gunamani Dasi* v. *Prankishori Dasi*[1]; *Haji Abdul Rahiman* v. *Khoja Khaki Aruth*[2], *Ghanasham* v. *Kashiram*[3]; *Mukund Harshet* v. *Haridas Khemji*[4]; *Azizan* v. *Matuk Lal Sahu*[5].

Narayan G. Chandavarkar for the respondent (plaintiff) :—The provisions of section 244 of the Civil Procedure Code are not a bar to the present suit. We seek to recover the money by way of damages—*Viraraghara Reddi* v. *Subbakka*[6]; *Sellamayyan*

(1) (1870) 5 Beng. L R, 223.
(2) (1886) 11 Bom, 6.
(3) (1891) 16 Bom, 589
(4) (1892) 17 Bom, 23.
(5) (1893) 21 Cal, 437.
(6) (1882) 5 Mad., 397.

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v. *Muthan*[1]; *Ishan Chunder* v. *Indronarain*[2]; *Hukum Chand Oswal* v. *Taharunnessa Bibi*[3].

Idgunji, in reply, cited *Gulwad* v. *Rahimtulla*[4] and *Dailata* v. *Ganesh*[5].

FARRAN C. J.:—A question, which the executing Court can itself consider, must be considered by that Court, and another Court cannot determine it for such executing Court. This results directly from the provisions of section 214. Whether an uncertified adjusted agreement not to execute a decree has been entered into or not, cannot, by reason of the provisions of section 258, be considered by the Court executing the decree. The provisions of section 244 do not, therefore, appear to me to be a bar to the present suit. The judgment of Turner, C. J., in *Viraraghava Reddi* v. *Subbakka*[6] is an authority for this view. There is now no other provision of the law which stands in the way of such a suit as this. That a suit for damages can be sustained, when after an uncertified adjustment a decree has been improperly executed, has been expressly decided in *Hukum Chand Oswal* v. *Taharunnessa Bibi*[3] and several other decisions which I am prepared to follow. In *Azizan* v. *Matuk Lal Sahu*[7], what the plaintiff sought to do was indirectly to compel the Court executing the decree to refrain from executing it by an injunction obtained in another Court. The case is distinguishable from the present, and the Calcutta High Court so regarded it, as will be seen from the conclusions in the judgment of Macpherson, J., at the bottom of page 444. I would dismiss the appeal with costs.

FULTON, J.:—I entirely concur in the judgment delivered by the Chief Justice. I think the reasons why section 244 of the Civil Procedure Code is no bar to a suit like the present, which is one to recover damages for breach of a contract not to execute a decree, are very clearly and correctly stated by Chief Justice Turner in *Viraraghava Reddi* v. *Subbakka*[6] as follows:—"The question relates not to the execution of the decree, but to a con-

(1) (1886) 12 Mad., 61.
(2) (1883) 9 Cal., 788.
(3) (1889) 16 Cal., 504.
(4) (1867) 4Bm. H. C. Rep., A C. J., 7.
(5) (1880) 4 Bom., 295.
(6) (1882) 5 Mad., at p. 400
(7) (1894) 21 Cal., 437.

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tract which formed no subject of inquiry in the suit, and could not form the subject of inquiry in execution of decree." It is equally clear that section 258, as now worded, is no bar to the Court's taking cognizance of such suit, for it is only the Court executing the decree which is precluded from recognizing the payment. A contract whereby a decree holder engages not to execute a decree seems valid, and I can see no reason why, if it has been broken, the injured party should not be entitled to sue for compensation in respect of any loss which he has suffered in consequence. I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr Justice Parsons and Mr. Justice Ranade.

1898. *August* 23.

SUNDRABAI (ORIGINAL DEFENDANT), APPELLANT, *v.* JAYAWANT (ORIGINAL PLAINTIFF), RESPONDENT.*

License—Easement—Indian Easements Act (V of 1882), *Secs.* 4 *and* 52—*Right of growing rice plants in another's land to be afterwards transplanted to his own.*

A 'license' as defined by section 52 of the Indian Easements Act (V of 1882) is not, as in the case of an 'easement', connected with the ownership of any land, but creates only a personal right or obligation. License rights are not generally transferable, and the transferee is not bound to continue the license granted by the former owner, while easements once established follow the property.

The plaintiff claimed and proved a prescriptive right of using certain land belonging to the defendant's mortgagor for a part of every year for raising rice plants to be afterwards transplanted to his own land.

Held, that the right was clearly enjoyed by the plaintiff as owner of some land to which the young rice plants were transplanted, and that such a right, so attached to plaintiff's land, was not a license but an easement of the nature of *profit à prendre*.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum.

The plaintiff sued to establish his right to grow *malak* or young rice plants in a certain field, to be afterwards transplanted to his own land.

* Second Appeal, No. 218 of 1898.

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Plaintiff alleged that this right had been enjoyed from time immemorial; that it had been acknowledged and confirmed to him in 1861 by a grant from one Bapu, the owner of the field in question, who had agreed to allow him in perpetuity the use of the land for the purpose of raising *malak* during a certain time of each year, and to pay him compensation in case of obstruction.

The cause of action was alleged to have accrued in 1891, when plaintiff was obstructed by defendant, who was in possession of the field as a mortgagee under Bapu.

Defendant denied the plaintiff's right and pleaded limitation.

The Subordinate Judge found that in the village of Halkarni, where the parties resided, only a small portion of land was capable of producing *malak* being low ground, and that the young plants raised thereon were afterwards transplanted to other land; that without the help of the low-lying land this other land would not yield any rice crops; and that it was this fact which originated the practice of raising rice shoots in another's land for subsequent transplantation elsewhere.

The Subordinate Judge further found that the plaintiff had acquired the right he claimed by prescription, he having been in enjoyment of it for more than fifty years prior to 1861, in which year it was admitted and confirmed by a grant executed by Bapu in plaintiff's favour. He, therefore, awarded the plaintiff's claim.

This decision was upheld, on appeal, by the District Judge, who held that the right was in the nature of an easement. His reasons were as follows:—

"It appears that for many years certainly since 1811 A.D., plaintiff has enjoyed the right of sowing rice in the land It is afterwards transplanted to his own land, which lies higher. If he could not raise the young shoots in the land in suit, he could not use his own land for rice crops. Viewed in this light, it may, I think, fairly be held that there are dominant and servient *praedia*."

Against this decision defendant preferred a second appeal to the High Court.

Branson (with him *V. G. Bhandurkar*), for the appellant (defendant):—The question is, what is the nature of the right

claimed by plaintiff? Is it a license, or is it an easement? We submit it is a license as defined by section 52 of Act V of 1882. The terms of the grant relied on by plaintiff show that it is nothing more than a license. The grant confers on the plaintiff personally the use of the land in order to raise rice plants for a certain part of the year. The grantor, moreover, agrees to pay damages in case of obstruction. The grant does not refer to any land in respect of which the right is conceded. There is thus no dominant tenement to which the right in question attaches. And this is confirmed by the fact that the right is granted to the plaintiff *in perpetuity*. There would be no necessity to use this expression if the right were one attaching to the land. The right is thus a purely personal right, and is, therefore, a license and not an easement—*Ramakrishna* v. *Unni Cheek*[1].

Macpherson (with him *M. V. Bhat*) for respondent (plaintiff):—It is found by both the lower Courts that the plaintiff cannot use his lands for rice crops unless he first sows rice in the field in question and afterwards transplants the rice-shoots to his own lands. It is also found that plaintiff has used the field in dispute for this purpose from time immemorial. The right has been thus exercised for the benefit of the dominant tenement. That being so, it is not a license, but an easement, as defined by section 4 of Act V of 1882. It is, strictly speaking, a right of the nature of *profit a prendre in alieno solo*. But such rights are included under easements as defined by the Act. No doubt the grant of 1861 does not specifically mention plaintiffs' lands as the lands for the beneficial enjoyment of which the right in question exists. But the grant does not create any new rights, but merely confirms the plaintiff in the exercise of those rights, which had been previously enjoyed for more than fifty years. And the grant should be construed with reference to the surrounding circumstances. These circumstances show that the right in question is an easement and not a mere license.

RANADE, J.:—The chief contention in this appeal relates to the question whether the right to raise *malak*, or young rice plants in the land in dispute, to be afterwards transplanted elsewhere, was

(1) (1892) 16 Mad., 270.

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of the nature of a license, as defined in section 52 of the Easements Act, or was an easement proper, as held by both the lower Courts.

The Easements Act, section 52, defines licenses as being rights to do, or continue to do, upon the land of another something which would otherwise be unlawful when such rights do not amount to an easement or an interest in property. This negative definition makes it necessary that, before a right can be shown to be a license only, it must be proved not to be an easement, or an interest in property. The essential requisites of an affirmative easement, as defined in section 4, are that it is a right which the owner or occupier of any land, as such, has to do, and continue to do, something for the beneficial enjoyment of his land in, or upon, or in respect of, land not his own. A license is not, as in the case of easements, connected with the ownership of any property, but creates only a personal right or obligation. License rights are not generally transferable, and the transferee is not bound to continue the license granted by the former owner, while easements, once established, follow the property. An interest in immoveable property is correctly described in section 58 of the Transfer of Property Act. It is thus clear that the decision of this appeal turns upon the inquiry whether the right claimed by the respondent-plaintiff was in the nature of an interest in property or an easement, or whether it was a mere license as defined in section 52, in other words, whether it was a limited interest to enjoy the use of land, or an incident attached to the land in dispute for the benefit of respondent's land, or whether it was a permission given to respondent which was not binding on the appellant, who is admittedly a mortgagee of the person who owned the land, and gave the permission.

The right claimed and found proved by both the Courts below is stated in the plaint to be confined to a small plot, measuring 310 cubits in length and 25 cubits in breadth, belonging to one Bapu, the mortgagor of the appellant. In this plot the respondent claims that he has, by immemorial prescription, as also under a grant from Bapu, made in 1864, a right to raise *malak*, or young rice plants, to be transplanted elsewhere. The agreement of 1864 recites the user as having obtained from former times,

and Bapu gave the right to respondent to use the land every year for raising *malak*, and, after it was removed, to cease to use the land. The grant is stated to be *nirantar*, and Bapu agrees to pay compensation in case of obstruction. It is this covenant about compensation, and the use of the word *nirantar* in the grant without further specification, and finally the absence of all mention of the land owned by respondent in which the transplantation was made,—it is these circumstances that are relied upon by appellant's counsel as reasons for his contention that the grant was a license, and not an easement or lease of the lands. The Courts below have, on the other hand, found that in this village of Halkarni, only a few lands are suited for the purpose of raising *malak*, and that the other lands can grow no rice unless it is transplanted from these low-lying lands. The obligation of the owners of the low-lying lands to those who own the upper dry lands is not confined to the plot in dispute. The liability is general, and is imposed by custom, and attaches to the lands by reason of their respective situations (Exhibit 58). It is in evidence that the respondent-plaintiff has lands of his own in the dry part of the village area (Exhibits 36, 57, 72). Two witnesses admit that both the parties to this suit raise *malak* in some temple lands cultivated by them; and appellant's witness, No. 73, admits that respondent has such a vahivat in this temple land. Witnesses Nos. 58, 69 state that this is a general practice in Chandgad mahál within which Halkarni is situated, and that even if the lands change hands, this right remains unaffected. It is quite clear that though the agreement does not mention respondent's land in express terms, the right is enjoyed by the respondent as owner of some lands to which the young rice plants are transplanted. All these facts brought out by the evidence prevent the right from being a merely personal license, and show that it is a part of the customary obligations of the owners of low-lying areas to the owners of the uplands where the water-supply is deficient.

We must accept this finding of fact, and it is plain that such a right cannot properly be described as being only a license. The words of the agreement absolutely prevent such a construction being placed upon them. The right did not originate in a grant, but in immemorial prescription, confirmed by a grant. The

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personal covenant was not intended to destroy the right, but to confirm it. This is no doubt an easement of the nature of *profits a prendre* appurtenant to land. This last class of beneficial enjoyment is not technically regarded as easements in English law, but the Indian Easements Act includes this under easements. Illustration (*d*) to section 4 of the Act mentions the right to pasture cattle in another person's lands, or to take fish out of a tank, or timber out of the forest of another man as instances of easement, and the present right resembles these easements. In *Ramakrishna* v. *Umi Cheek*[1], there is an illustration of a right in the nature of a license, pure and simple. The judgment in that case refers to an English case—*Doe* v. *Wood*[2]—where the distinction between a license and the demise of an interest in land is clearly laid down. If the authority gave only a right to dig for tin or other metals, and remove the ore so dug out, it was of the nature of a license; but if the grant demised all the ores existing in any particular area, then it was a demise of interest in land. The right claimed here conferred on the respondent the use of the land for a certain part of the year for raising rice plants for the purpose of transplanting them to his own land. The respondent has exercised this right from time immemorial, *i.e.*, at least for 50 or 60 years before the agreement of 1861, and since then down to 1893-94 against the grantor Bapu and his sons. Such a right, so attached to his lands, and so enjoyed, cannot be regarded as a mere license not binding upon the original grantor's and his son's mortgagee, the appellant. It is not a personal license revokable at the grantor's pleasure. It is an easement, or more correctly a permanent lease of the land for a portion of the year for a specific purpose. We must, therefore, overrule this contention of the appellant, and rejecting the appeal confirm the decree with costs on appellant.

Decree confirmed.

(1) (1892) 16 Mad., 280. (2) (1819) 2 B and Ald., 724.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BAI DIVALI (ORIGINAL PLAINTIFF), APPLICANT, *v.* HIRALAL AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS.* 1898. *August* 23.

Lunatic—Guardian of the person of a lunatic not competent to sue in respect of the lunatic's estate—Civil Procedure Code (Act XIV of 1882), *Sec.* 140—*Guardian—Right to sue—Practice—Procedure.*

A guardian of the person only of a lunatic has no right to bring a suit in respect of the lunatic's estate. The manager of the lunatic's estate is the only person who can institute such a suit.

The word "guardian" in section 440 of the Civil Procedure Code (Act XIV of 1882) as amended by Act VIII of 1890, when applied to a lunatic means the manager of his estate. Under this section a person other than the guardian of the estate can also sue with the leave of the Court.

APPLICATION under section 622 of the Code of Civil Procedure (Act XIV of 1882).

One Ichhalal Vrijbhukan died in 1891 possessed of ancestral property worth about six lákhs of rupees. He had three sons, Navnidlal, Hiralal, and Chotalal.

Navnidlal was adjudged a lunatic under Act XXXV of 1858. His wife Bai Divali was appointed guardian of his person, and his brother Hiralal was appointed manager of his estate, under sections 9 and 10 of the Act.

In 1897 Bai Divali, as guardian of the lunatic, applied for leave to sue *in formâ pauperis* for partition of the lunatic's share in the ancestral property.

This application was rejected by the First Class Subordinate Judge of Surat on the ground that Bai Divali had no right to sue, and that the only person, who could bring a suit in respect of the lunatic's property, was the manager of his estate and not the guardian of his person.

Against this order Bai Divali applied to the High Court under its extraordinary jurisdiction.

*Application No. 63 of 1898.

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Govardhanram M. Tripathi for applicant:—The applicant is the guardian of the person of the lunatic on whose behalf the suit is to be instituted. The lower Court is wrong in holding that the applicant is not entitled to sue. The provisions of the Code of Civil Procedure relating to suits by minors are made applicable to suits by or on behalf of lunatics. The last clause of section 440 of the Code provides that a person appointed a guardian of a minor can bring a suit on behalf of the minor. This clause is added by section 53 of the Guardians and Wards Act VIII of 1890. In that Act the word "guardian" is defined to be a person having the care of the person of a minor or of his property, or of both his person and property. In other words, the word "guardian" means both a guardian of the person and a guardian of the property of a minor. That being so, a guardian of the person of a minor or a lunatic can institute a suit under section 440 of the Code. Before this section was amended by Act VIII of 1890, any adult person, whether a guardian or not, could sue as next friend of a minor. The applicant is the wife as well as guardian of the lunatic. She is, therefore, competent to sue. In the present case, if she were debarred from suing on behalf of the lunatic, his interest would not be safe in the hands of the defendants.

Macpherson (with *Chitnis, Motilal and Malvi*) for the opponents —The applicant's husband was adjudged to be a lunatic under Act XXXV of 1858. The opponent was appointed a manager of the lunatic's estate under section 9 of the Act. The whole estate of the lunatic is now vested in the manager so appointed. Under section 11 of the Act the manager has the same power in the management of the estate as might have been exercised by the proprietor if he had not been a lunatic. He alone has the power to collect and pay all debts and liabilities due to or by the estate of the lunatic. He is, therefore, the only person who can bring a suit in respect of the lunatic's estate. And it is the invariable practice, both here and in England, for the committees of the estate of lunatics to institute suits or other proceedings on behalf of lunatics. Section 440 of the Code of Civil Procedure does not alter the existing law on the subject. The word "guardian" as used in the section, so far as it is applicable to a

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lunatic, means the manager of the estate of a lunatic. Moreover, the applicant has no right to sue for a partition of the ancestral property while her husband is a lunatic—*Dayabhai* v. *Umed* [1].

PARSONS, J.:—The Subordinate Judge, First Class, rejected the petition of the applicant for permission to sue as a pauper on the ground that it was presented by an unauthorized person.

It was presented by the applicant (the wife of a lunatic) who had been appointed the guardian of the person of the lunatic under the Lunacy Act, XXXV of 1858, and it asked for a severance of the share of the lunatic by a partition of the joint family property. A different person had been appointed manager of the estate of the lunatic, and the Subordinate Judge was of opinion that the manager alone had the power to bring a suit in respect of the estate of the lunatic. We think that he is right.

The contention of the applicant is that she, having been appointed guardian of the person of the lunatic, comes within the definition of guardian in section 440 of the Code of Civil Procedure, and that as such she has, if not the sole right, yet the right to bring any suit she pleases in respect of his property.

Whatever may be the meaning of the word "guardian" used in the clause added to section 440 of the Code of Civil Procedure by the Guardians and Wards Act, 1890, when minors are concerned, we have no reason to suppose that the Legislature, when making the addition, intended in any way to alter or affect the existing law in respect of the persons who alone are entitled to bring suits on behalf of the estate of a lunatic. The provisions of that section have by section 463 to be applied to lunatics *mutatis mutandis*, and we cannot construe the word "guardian" in section 440 to mean a guardian of the person who is, by the Lunacy Act itself section 13, given only the care of the person and maintenance of the lunatic. We must take it to mean the manager of his estate, who alone has the right to bring a suit in respect of the estate of the lunatic as being the person in whom by section 14 all the powers of management of that estate are vested, and who has to provide for the maintenance of the lunatic. It would lead to endless confusion if, in cases where

(1) P. J. for 1896, p. 654.

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there is both a guardian of the person and a manager of the estate of a lunatic, we were to rule that each had the power to sue. The Legislature has provided for this contingency where a next friend has to be appointed (see the addition to section 443 made by the Act of 1890), but it has used the single word "guardian" in section 440, thereby, in our opinion, indicating that irrespective of the name of the appointment, the guardian intended in it must have the power to bring a suit which he could only have in the case of a lunatic by virtue of his being appointed the manager of the estate,—in other words, that the person denominated guardian must mean the person who is himself competent to sue. A guardian of the person only of the lunatic has no such power. While, however, holding that the Subordinate Judge was right in deciding that the application was presented by an unauthorized person, we must rule that he was wrong in summarily rejecting the application. Under section 440 a person other than the guardian is given the power to institute a suit with the leave of the Court. The Subordinate Judge should have followed the provisions of that section, and determined whether or not such leave should be given. We reverse his order for this reason and return the application for him to dispose of it according to law. We express no opinion on the new point raised before us as to the right of the lunatic to a separate share. We make costs costs in the cause.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

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August 29.

HONAPA (ORIGINAL PLAINTIFF), APPELLANT, *v.* NARSAPA AND OTHERS (ORIGINAL DEFENDANTS NOS 1 TO 4 AND 7), RESPONDENTS.*

Fraud—Fraudulent conveyance—Conveyance by plaintiff to defeat creditors—Subsequent suit by plaintiff to recover possession.

When property has been conveyed by the owner to another person with the object of defrauding his (the owner's) creditors, and the fraud has been carried out, the owner cannot succeed in a suit to recover possession.

* Second Appeal, No. 28 of 1898.

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SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum, reversing the decree of Ráo Sáheb V. V. Tilak, Subordinate Judge of Chikodi.

Suit to recover possession of land.

The following are the only facts in the case material to this report.

In 1868 the plaintiff's father Narsapa, in order to defraud his creditors, mortgaged the land in question to one Jivaji Tregal, and in 1872 the plaintiff's brother Rama (with the plaintiff's consent) for the same purpose sold it to the mortgagee Jivaji. Notwithstanding this mortgage and sale, however, Narsapa and his son (the plaintiff and Rama) remained in possession until 1880. In that year the son of Jivaji (the mortgagee and vendee) sold the land to Shidapa (defendant No. 7) and the latter obtained possession. It was disputed at the hearing whether Shidapa remained in possession, but the allegations relating to this point are not material to this report.

In 1895 the plaintiff brought this suit to recover possession of the land. The Subordinate Judge passed a decree in his favour, holding that he was not estopped from asserting his claim by the mortgage and sale in 1868 and 1872.

On appeal, the Judge reversed the decree and dismissed the suit, holding that the mortgage and sale were fraudulent transactions and that the plaintiff having thus parted with his estate the Court would not assist him to recover it.

The plaintiff preferred a second appeal.

Mahadev V. Bhat for the appellant (plaintiff):—The fraudulent sale in 1872 was really the fraud of the plaintiff's brother, and the plaintiff is not precluded from recovering—*Sreemutty Debia* v. *Bimola*[1]; *Param Singh* v. *Lalji Mal*[2].

Balaji A. Bhagvat and *Dhondu P. Kirloskar* for respondents (defendants):—The plaintiff cannot be allowed to benefit by his own fraud. The lower Courts have found that the mortgage and sale were in fraud of creditors. By that fraud the plaintiff

(1) (1874) 21 Cal. W. R., 122. (2) (1877) 1 All., 403.

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lost possession and cannot now recover it—*Chenvirappa* v. *Puttappa*[1], *Yaramati* v. *Chundru Papayya*[2]; *Babaji* v. *Krishna*[3].

FARRAN, C. J. (after discussing other questions raised in the case continued.—) But assuming that Shidapa did regain, and is now in possession of, the land and that he claims to retain such possession on the strength of the mortgage and sale by Narsapa and his son Rama to Jivaji Tregal and of the sale by the son of the latter to himself (Shidapa), the question which has been discussed by the District Judge and my learned colleague arises. I do not enter upon the distinction which my learned colleague draws between a fraudulent conveyance in England and a fraudulent conveyance in India, but take the facts as they are found. The Subordinate Judge finds that the sale to Jivaji was fictitious and that the defendant No. 7, Shidapa, acquired nothing by his purchase. The District Judge raised these issues :—

(3) Is the plaintiff estopped from asserting his title to the land?

(4) In view of the fact that the plaintiff confessedly sold fraudulently to Jivaji, from whose son the defendant No. 7 alleges that he purchased *bonâ fide* and for valuable consideration, what right has the plaintiff (*a*) against him; (*b*) against the defendants Nos. 1—4 in possession whom he wishes to eject?

The findings are :—On the 3rd issue that the plaintiff is estopped, and on the 4th issue that the plaintiff has no right remaining against defendants Nos. 1—4 or defendant No 7

The District Judge does not anywhere set out the exact nature of the transaction. The nearest approach to it is found in the following passage :—

"The original mortgage to Jivaji Tregal was admittedly a fraud and intended to operate against honest creditors. It admittedly did so. Assuming for the sake of the plaintiff's argument at this bar that there was a distinction beween the mortgage to Jivaji Tregal and the subsequent sale to him, inasmuch as the mortgage did, while the sale did not in fact protect the property from the creditors, it remains plain to all that the origin of Tregal's connection with the property was in fraud, and that

(1) (1887) 11 Bom., 708. (2) (1897) 20 Mad., 526.
(3) (1893) 18 Bom., 372.

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since the sale was admittedly pursuant to and in completion of the mortgage, the same taint affects it." Later on he writes: "The plaintiff having perpetrated a fraud and pursuant thereto parted with his estate, neither law nor equity will help him."

The above findings taken all together appear to me to represent the following state of facts:—By a mortgage and sale, which formed one single transaction, the plaintiff conveyed the property in question to Jivaji Tregal for the purpose of defeating the claims of honest creditors, who were in consequence defrauded; that the said Jivaji Tregal or his son transferred the estate thus conveyed to Jivaji to the defendant Shidapa; that Shidapa under colour of the above deeds ousted the defendants Nos. 1—4 from the property, and that they (defendants Nos. 1 to 4) recovered possession through the Court of the Mámlatdár. The plaintiff now seeks to recover the estate which he conveyed away in order to defraud creditors from the defendants Nos 1—4 and Shidapa.

The law applicable to that state of facts is, in my opinion, that laid down by Benson, J., in *Yaramati Krishnayya* v. *Chundru Papayya*[1], which I think that we should follow in preference to the Allahabad decision in *Param Singh* v. *Lalji Mal*[2]. There is no question of estoppel in the matter. When both parties are equally conversant with the true state of the facts, it is absurd to refer to the doctrine of estoppel. The rule is *in pari delicto potior est conditio possidentis*. Equity will not lend her aid to enable a successfully fraudulent plaintiff to avoid the coils which his own fraud has woven around him. All the Courts, except the Allahabad Court in the above case, refer to the English authorities to guide them in this matter. I am of opinion that they rightly do so. The judgment in the Madras case, which I have referred to, gives, I think, succinctly the result of the English authorities. Therefore, I consider that we should follow it. The Calcutta decisions in *Goberdhan Singh* v. *Ritu Roy*[3] are to the same effect, though the learned Judges have not stated the law so elaborately as has been done in the Madras case to which I have referred. The decree is confirmed with costs.

(1) (1897) 20 Mad., 326. (2) (1877) 1 All., 103.
(3) (1896) 23 Calc., 962 at p. 966.

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FULLER, J. (after dealing with other questions in the case continued:—) But as regards Shidapa the case is different. As this man claims under a title derived from Narsapa, he cannot dispute the fact of Narsapa's ownership. He says he is in possession, and if this is so, the question arises whether, as against the plaintiff, who alleges that the conveyance to Tregal was a sham transaction entered into to defeat creditors, he is entitled to retain possession. The District Judge, without determining whether Shidapa was a *bond-fide* purchaser for value or whether the plaintiff's claim is barred by limitation, has held that the plaintiff alleging a fraud on creditors, which he has found to be successful, cannot maintain this suit to recover possession. To support this view he relies on the decision in *Chenvirappa* v. *Puttappa*[1], but though many of the remarks in that case are in favour of the important principle for which the learned District Judge so ably contends, the decision cannot be cited as an authority governing the present case, inasmuch as the point decided was simply that a party to a collusive decree is bound by it. Quite apart from the equitable considerations referred to by the learned Judge, that decision seems to depend really on section 13 of the Civil Procedure Code See *Kamalarajulu* v. *Srinivasulu*[2]. Here, however, the question is unaffected by any decree between the parties. The plaintiff in effect says: "The land is mine, because though I assented to a deed in favour of the defendants' vendor, and put him in possession, the transaction was a sham transaction and had no effect in conveying any property to him." Now, assuming the facts alleged to be proved, it is difficult to avoid the conclusion that the property still remains in the plaintiff. The mere execution of a conveyance and transfer of possession does not appear sufficient, in India, to effect a change of ownership, unless there be an intention to convey. The intention, I think, is essential to the conveyance. This is obvious in the case of a man who signs a conveyance in ignorance of its contents. The surrender of his property to another is an act of the will, and if there is no will, there is no surrender. *A fortiori*, if, the attention being directed to the nature of the deed, the will is exerted, not towards the surrender

(1) (1887) 11 Bom., 708. (2) (1897) 20 Mad., 333.

of the property, but towards its retention, there can, I think, be no conveyance. Of course, if the opposite party, in whose favour the deed purports to be executed, is ignorant of the intention and takes the property believing that it has been conveyed to him, the law of estoppel will intervene for his protection. But if he, too, knows of the want of intention to convey and assents to the proceeding, no question of estoppel seems to arise. In such a a case the decisions in *Tillakchand* v. *Jitan al*[1] and *Abdul Hye* v. *Mir Mohammed*[2] show that the property remains in the original owner. Referring to these cases, the Chief Justice in *Sadashiv Vaman* v. *Trimbak Divakar*[3] said (p. 170): "In India, where the *benami* system is common, it has been recognized by our Courts that there may be a sham conveyance, which, though registered and delivered to the grantee, not being intended to pass the property, but merely to be used as a blind to deceive creditors or others, conveys no estate to the nominal grantee." In such a case possession is given not under the deed, the execution of which has no bearing on the real transaction between the parties, but under the private arrangement.

The question, then, arises whether, when the owner of the property seeks to recover it, the Court has any discretion to refuse him its aid. Doubtless the private arrangement, being *ex hypothesi* in fraud of creditors, is a void agreement, and if it is necessary for the plaintiff to rely upon it to support his claim, his case must break down. But is it necessary? The general rule of law, I believe, is that a man is entitled to possession of his own property unless the defendant can show some right for retaining it. It may, therefore, be argued that the Court has no discretion in the matter, and it seems necessary to consider the point.

In *Rangammal* v. *Venkatachari* [4] and *Yarnati Krishnayya* v. *Chundru Papayya* [5], the Madras High Court refused a declaration of invalidity in respect of certain collusive deeds; but as those were suits under section 39 or section 42 of the Specific Relief Act, in which a discretion is reserved, they are not exactly in point. They leave open the question whether, when a claim

(1) (1873) 10 Bom. H. C. Rep., 210.
(2) (1883) 10 Cal., 616.
(3) (1898) 23 Bom., 146.
(4) (1895) 18 Mad., 378; (1896) 20 Mad., 323.
(5) (1897) 20 Mad., 326.

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is made in a form which would not have come within the cognizance of Courts of Equity in England, there is the same latitude. In England probably the plaintiff could not obtain relief without first setting the deeds aside (see *Sadashiv Vaman* v. *Trimbak Divakar* [1]), but here this preliminary step appears unnecessary. See *Nagathal* v. *Ponnusami* [2] and *Sham Lall Mitra* v. *Amarendro Nath Bose* [3] in which their Lordships said (p. 466): "Here, if the plaintiff's allegations are substantiated, the deeds in question were never intended to be operative, and, therefore, would not be operative, no matter whether they are set aside or not."

On the simple question whether, notwithstanding the fraudulent execution of a sham conveyance, the owner is entitled to recover his property, the cases of *Phool Bibee* v. *Goor Surun Doss* [4], *Bykunt Nath Sen* v. *Goboollah Sikdar* [5] and *Param Sing* v. *Lalji Mal* [6] are explicit in his favour. But the last of these three cases, in which a decree had to be set aside, is inconsistent with the decision of this Court in *Chenvirappa* v. *Puttappa*[7]. The cases of *Mahadaji Gopal* v. *Vithal Ballal* [8] and *Dharma Sakharam* v. *Nago Badgu* [9], which at first sight seem authorities in the plaintiff's favour, have been explained in *Chenvirappa* v. *Puttappa* and *Babaji* v. *Krishna* [10], and owing to special circumstances depended on an estoppel preventing the defendants, who were mortgagees, "from setting up the fictitious form of the transaction as fraudulently intended to shield the property from the claims of creditors." In *Sreemutty Debia* v. *Bimola Soonduree* [11] and *Babaji* v. *Krishna*, the defendants in possession were allowed to prove the unreality of the deeds relied on by the plaintiffs. In *Sham Lall Mitra* v. *Amarendro Nath Bose*[3], where the fraud had not been carried into effect, the plaintiff was allowed to get relief notwithstanding his execution of a collusive deed. But in *Goberdhan Singh* v. *Ritu Roy* [12],

(1) *Ante* p. 146.
(2) (1889) 13 Mad., 44.
(3) (1895) 23 Cal., 460.
(4) (1872) 18 W. R., 485.
(5) (1875) 24 W. R., 391.
(6) (1877) 1 All., 403.
(7) (1887) 11 Bom., 708.
(8) (1881) 7 Bom., 78.
( ) P. J. for 1890, p. 275.
(10) (1893) 18 Bom., 372.
(11) (1874) 21 W. R., 422.
( ) (1896) 23 Cal., 963.

where the fraud was complete, the claim of a plaintiff seeking to recover possession from his so-called benamidár was rejected.

This last decision should, I think, be followed. I know of no technical rule compelling the Court to pass a decree for possession, and the mere fact that in this country the owner is not obliged to sue to get the deed set aside as he would probably have to do in England, does not seem any ground for coming to a result different from that at which on similar facts Courts in England would arrive in exercise of their equitable jurisdiction. The distinction in the form of the suit is merely nominal. If relief is granted, the fraudulent object, namely, the preservation of the property by the owner, is achieved through the action of the Court. And, whatever may be the form of the suit, whether cancellation of the deed or for recovery of possession, the object is one for the accomplishment of which no Court ought, I think, to render any assistance.

Where a defendant in possession proves that he is the real owner and that the deed under which the plaintiff is claiming is fraudulent and collusive, he is left in possession, because the plaintiff has no just claim to the property. He owes his safety, not to the Court's action, but to the fact that he is in possession, and the plaintiff cannot establish a right to turn him out. But, if we look to the substance rather than the form, similar reasoning seems to apply when the original owner, after a successful fraud, seeks to recover possession from the benamidár. In justice he has no right to the land which ought to have been sold for the benefit of his creditors, and the Court, therefore, will not give him what he is not equitably entitled to. In the one case, as in the other, the Court considers whether the plaintiff can make out, not merely a technically correct title, but also a substantially just one. Where the fraud is not completed, it may well be contended that, as the collusive transaction has not really frustrated justice, the original owner still retains a good claim to the property.

For the foregoing reasons I would confirm the decree with costs.

Decree confirmed.

ORIGINAL CIVIL.

Before Mr. Justice Strachey and Mr. Justice Fulton.

1898. *September 23.*

SOONDERLAL AND ANOTHER, PLAINTIFFS, *v.* GOORPRASAD AND ANOTHER, DEFENDANTS;* AND GOORPRASAD AND ANOTHER, PLAINTIFFS, *v.* SOONDERLAL AND ANOTHER, DEFENDANTS.†

Decree—Ex-parte decree—Appearance of party—Appearance by pleader or recognized agent—Appearance only for purpose of applying for adjournment—Civil Procedure Code (Act XIV of 1882), Secs. 36, 37, 100, 102, 103—Presidency Small Cause Court Act (XV of 1882), Sec. 38—Dismissal for default—Remedy of plaintiff—Practice—Procedure.

A suit and cross-suit between the same parties were on the board for hearing on the 23rd April, 1898. On that day A, the counsel who was instructed for the defendants in the first suit and for the plaintiffs in the second, was unable to attend, and B, another counsel, held his brief and appeared on his behalf and applied for two months' adjournment of both suits. The munim of his clients was then in Court. B was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused and B said he withdrew from the case. Both suits were then and there disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed for non-appearance. On the 7th May following, an application was made for a rehearing of both suits. The Court, regarding the decrees as *ex-parte* decrees, granted a rule for a new trial, which was made absolute. On appeal to the full Court the matter was referred to the High Court.

Held, that under the circumstances the suits were to be considered as having been disposed of under sections 100 and 102 of the Civil Procedure Code (Act XIV of 1882) respectively, and that whether or not they, or either of them, fell within the category of contested suits as defined by section 38 of the Presidency Small Cause Courts Act (XV of 1882), the remedy under section 103 of the Civil Procedure Code was open to the plaintiffs in the cross-suit.

Where, on the day fixed for hearing, a party is present in person merely for the purpose of applying for an adjournment which is refused, he must be taken to have "appeared" within the meaning of Chapter VII of the Civil Procedure Code. The party has appeared in person. The purpose for which he appeared, or the action which he took on appearance, are immaterial.

But where the party is absent and an application for adjournment is made on his behalf by a pleader who has no other instructions, and whose functions are at an end when the adjournment is refused, in that case the party has not appeared within the meaning of the chapter.

* Small Cause Court Suit, No. 13201 of 1897, and † Small Cause Court Suit, No. 14928 of 1897.

Where the pleader who applies for an adjournment is accompanied by a recognized agent of the party, but the latter neither makes any application, nor does any act, the question is whether he *intends* to appear and in fact does appear for the party in the exercise of his powers under section 36 of the Civil Procedure Code. That section is merely permissive and enabling. If the recognized agent although able to do so does not think proper to conduct the case on behalf of his principal, his mere presence in Court is not an "appearance" in the suit. An appearance may be made by a pleader or a recognized agent: but the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented.

Section 38 of the Presidency Small Cause Courts Act (XV of 1882) does not preclude a plaintiff whose suit has been dismissed for default from applying under section 103 of the Civil Procedure Code (Act XIV of 1882) to have the order of dismissal set aside. There is no inconsistency between the two sections. A plaintiff whose suit has been dismissed for default has two separate remedies under different enactments. If he chooses to apply for a new trial under section 38, he must do so within eight days. If he prefers to apply for an order setting aside the dismissal under section 103 of the Civil Procedure Code, he can do so within thirty days (Limitation Act, XV of 1877, Schedule II, Art. 163).

CASE stated for the opinion of the High Court under section 617 of the Code of Civil Procedure (Act XIV of 1882) by C. W. Chitty, Chief Judge, and Khán Bahádur Hormusji Dadabhai, Fourth Judge :—

"1. The above two suits, which were suit and cross-suit between the same parties, were placed on the board of the Fourth Judge for hearing on the 29th October, 1897, 15th December, 1897, and the 1st February, 1898. On each occasion they were adjourned by consent, and on the last occasion the adjournment was granted to the 23rd April, 1898.

"2. On the 23rd April, 1898 (Saturday), Mr. Davur was instructed for the defendants in the first and plaintiffs in the second suit. As he was unable to attend, Mr. Dadysett held his brief and appeared on his behalf as authorized by Rule XVII of the Rules of this Court. Mr. Dadysett, who was accompanied by one Bunsidhur Nathuram, the munim of his clients, applied for two months' adjournment of both suits. He was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused and Mr. Dadysett said that he withdrew from the case. Both suits were then and there

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disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed as for non-appearance.

"3. On the 7th May, the said Bunsidhur Nathuram instructed Mr. Brown to apply for a rehearing of both suits. He made an affidavit in which he described himself as the munim of the defendants in the first and the plaintiffs in the second suit. He stated the facts out of which the suits arose. The 6th para. of his affidavit as to what happened on the 23rd April contains some misstatements, but he offered to deposit the amount of the claim in the first suit in Court. The Fourth Judge regarding the decree as *ex parte* granted a rule *nisi* for a new trial on deposit of the amount. The rule finally came on for hearing on the 18th June last, when it was made absolute.

"4. The plaintiffs in the first and defendants in the second suit appealed to the Full Court, consisting of myself and the Fourth Judge, to have that order set aside on the ground that the Fourth Judge had no power to make it. The matter was argued before us on Tuesday, the 5th July, 1898, when we reserved judgment.

"5. It should be stated that we are agreed that Bunsidhur Nathuram must be regarded as the recognized agent of the defendants in the first and plaintiffs in the second suit. He was admittedly their munim, who was carrying on their business in Bombay, they being residents outside the jurisdiction of this Court. He, therefore, falls directly within the definition of recognized agents contained in section 37 (c) of the Civil Procedure Code. As to how far he was conversant with the facts of the case (he states them very fully in his affidavit), or to what extent he was instructed by his masters, we cannot say.

"6. The sole question for their Lordships' consideration will be, whether, under the circumstances above stated, the suits must be considered as having been disposed of under sections 100 and 102 of the Civil Procedure Code (Act XIV of 1882) respectively, or whether they, or either of them, fall within the category of contested suits as defined by section 38 of the Presidency Small Cause Courts Act (XV of 1882) as amended by Act I of 1895.

"7. So far as the Code of Civil Procedure is concerned, both suits appear to stand on the same footing. Sections 100 and 102 prescribe the procedure 'if the plaintiff appears and the defendant does not appear' and 'if the defendant appears and the plaintiff does not appear.' By section 36, appearance can be made by the party in person or by his recognized agent or by a pleader duly appointed. Chapter VII of the Code draws no distinction between appearances. It does not, that is to say, recognize an appearance for a limited purpose, nor does it make allowances in the case of a person appearing by a pleader partially or imperfectly instructed. In our opinion, therefore, it follows that, if the wording of the sections in Chapter VII is to be strictly construed, the defendants in the first and plaintiffs in the second suit must be held to have "appeared" on the 23rd April, 1898, as not only was their advocate but also their munim in Court.

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"8. There is, so far as we are aware, no definite ruling of the Bombay High Court on the subject. In Calcutta under the old Code it was held that where a counsel applied for an adjournment, and on its being refused said he did not appear further, that the decree was *ex parte*: see *Administrator General of Bengal* v. *Lala Dyaram*[1]. In the recent case of *Rampertab Mull* v. *Jaheeram Agurwallah*[2] the plaintiff instructed his counsel to move for an adjournment. It was refused; the case was dismissed for want of prosecution. The head-note is quite misleading, and from the body of the report it is difficult to ascertain whether the plaintiff was or was not actually present in Court. It would rather appear that he was. The learned Judge, however, did not actually decide the question whether or not the case fell within section 102 of the Civil Procedure Code, but dismissed the application on the merits.

"9. With regard to Suit No. 14928 of 1897, it should be noticed that this suit stands on a somewhat different footing, because of the wording of sections 37 and 38 of the Presidency Small Cause Courts Act above mentioned. The explanation to section 38 defines all cases to be "contested in which the decree is made

(1) (1871) 6 Beng. L. R., 688. (2) (1896) 23 Cal., 991.

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otherwise than by consent of or in default of appearance by the defendant." This makes no exception in the case of suits in which the defendant appears and denies the claim, and which are dismissed for non-appearance of the plaintiff. If this section be taken literally, it would follow that such suits must be regarded as contested, and that the plaintiff has only eight days in which to come in and set aside the order of dismissal. Such a decision would be somewhat inconsistent with the application to this Court of sections 102 and 103 of the Civil Procedure Code, which would in that case be, to say the least, superfluous, but it appears to us that the wording is clear and admits of no other interpretation.

"10. As on full consideration of the matter we entertain doubt as to how it should be decided, and as the point is one of great importance and of the most frequent occurrence in this Court, we submit it for the decision of their Lordships. We have, as required by section 618, stayed the proceedings in both cases pending the return of this reference. The case being stated by the Court *suo motu*, no deposit has been called for from the parties."

The Fourth Judge had made a note at the end of the case as follows:—

In making the order of the 16th June, 1898, I followed the rulings of the Allahabad and Calcutta High Courts. As, however, I entertain some doubt on the point, I concur in making the reference.

Lang (Advocate General) as *amicus curiæ* for the plaintiffs in the first suit and the defendants in the second.

Scott, amicus curiæ, for the defendants in the first suit and the plaintiffs in the second.

The following authorities were referred to:—Small Cause Courts Act XV of 1882, Secs. 37 and 38; Act I of 1895, Sec. 5; *Bhimacharya* v. *Fakirappa*[1]; *Ramchandra Pandurang* v. *Madhav Purshottam*[2]; *Hildreth* v. *Sayaji Piraji*[3]; *Administrator General of Bengal* v. *Lala Dyaram*[4]; *Janardhan Dobey* v. *Ramdhone*

(1) (1867) 4 Bom. H. C. Rep., A. C. J., 206.
(2) (1891) 16 Bom., 23.
(3) (1895) 20 Bom., 380.
(4) (1871) 6 Ben. L. R., C88.

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Singh[3]; *Hira Dai* v. *Hira Lal*[2]; *Ramtahal Rai* v. *Rameshar Ram*[3]; *Buldeo Misser* v. *Syed Ahmed Hossein*[4].

SARGENT, J.:—The principal question raised by this reference is whether the Fourth Judge of the Court of Small Causes was right in holding that the decree against the defendants in the suit had been passed *ex parte* and that their cross-suit had been dismissed for non-appearance, and whether he was competent to set aside the decree and the dismissal. The suit and the cross-suit were on the board for hearing on the 29th October and 15th December, 1897, and the 1st February, 1898, and on each of those days were adjourned by consent. The last adjournment was to the 23rd April. What happened on that day is thus stated in the reference:—'Mr. Davur was instructed for the defendants in the first, and plaintiffs in the second, suit. As he was unable to attend, Mr. Dadysett held his brief and appeared on his behalf as authorized by Rule XVII of the Rules of this Court. Mr. Dadysett, who was accompanied by one Bunsidhar Nathuram, the munim of his clients, applied for two months' adjournment of both suits. He was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused and Mr. Dadysett said that he withdrew from the case. Both suits were then and there disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed as for non-appearance.' It is stated in the reference that the munim Bunsidhar Nathuram was, within the meaning of section 37 (*a*) of the Code, a recognized agent of the defendants in the suit and plaintiffs in the cross-suit, but that how far he was, on the 23rd April, conversant with the facts of the case, or to what extent he was instructed by his masters the Court is unable to say. All that appears in connection with this point is that, although the munim was present when the application for adjournment was made, the counsel applying was unable to state what was the defence, if any, to the first suit. On the 7th May, however, an application was made on behalf of the defendants, and upon the munim's instructions, for a rehearing of both suits, and eventually the Fourth Judge,

(1) (1896) 23 Cal., 738.
(2) (1883) 7 All., 538.
(3) (1886) 8 All., 140.
(4) (1871) 15 Cal. W. R. 143.

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regarding the suit and the cross-suit as having been disposed of under sections 100 and 102 of the Code respectively, set aside the decree in the suit and the dismissal of the cross-suit. The question raised before the Full Court of Small Causes, and referred to us, is whether he had power to do so. In other words, can a party be said to "appear" at an adjourned hearing when, in his absence, but in the presence of his recognized agent, who is not shown to be conversant with the facts of the case, his counsel, instructed only for the purposes of the application, applies for a further adjournment, and, the adjournment being refused, withdraws and takes no further part in the proceeding?

The question depends first on section 157 of the Code (Act XIV of 1882), which provides that "if on any day to which the hearing of the case is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Chapter VII, or make such other order as it thinks fit." The word "appear" in this section in reference to the adjourned hearing must have the same meaning as in sections 100 and 102 and other sections in Chapter VII in reference to the day originally fixed for the hearing. What, then, is meant by the words in section 100 "if the plaintiff appears and the defendant does not appear," and in section 102 "if the defendant appears and the plaintiff does not appear"? Is the mere presence in Court of a recognized agent, or the presence of a pleader instructed only to apply for an adjournment, an appearance by the plaintiff or the defendant? The whole of Chapter VII deals with "the appearance of the parties and consequence of non-appearance." The "appearance" to which all the sections refer, is shown by the opening words of sections 96, 97 and 98 to be appearance "on the day fixed in the summons for the defendant to appear and answer." Section 64, read with Form No. 117 of the fourth schedule, explains the nature of the defendant's appearance in obedience to the summons to appear and answer. He is to appear "in person or by a duly authorized pleader of the Court duly instructed and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions", on a specified date "to answer the above named

plaintiff." He is further given notice that, in default of his appearance,—that is, appearance in either of the ways specified,—on the day above mentioned, the suit will be heard and determined in his absence, that is, under Chapter VII.

Thus the appearance of the defendant mentioned in Chapter VII means appearance either (1) by the defendant in person, or (2) by a pleader either himself duly instructed and able to answer all material questions relating to the suit, or accompanied by some other person able to do so. The test of whether the defendant has or has not "appeared" within the meaning of the chapter, is whether such of the requirements of the summons as relate to appearance have or have not been complied with. If the defendant has appeared in either of the two ways specified, then he has appeared, and it is immaterial for what purpose he has appeared, or what action he has taken on appearance, and in particular that, when appearing, he may not have intended to comply with the other requirements of the summons—"to answer the above named plaintiff," to produce his witnsses, or to bring or send his documents. So far as Chapter VII is concerned, the only question is appearance or non-appearance. The appearance of the plaintiff also must mean appearance by either of the two modes specified, for the word "appearance" is clearly used in Chapter VII in the same sense whether the plaintiff or the defendant is spoken of. To these two modes of appearance a third must be added, that is, appearance by a party's recognized agent under sections 36 and 37.

This being what Chapter VII means by "appearance," let us consider what happens on the day fixed for hearing. If a party wholly fails to appear, that is, if neither he, nor his pleader, nor his recognized agent, is present, the procedure provided by the chapter is plain enough. The difficulty is where one of them is present, but only for the purpose of applying for an adjournment, and, when the adjournment is refused, withdraws from the Court. Now, taking in turn each of the possible modes of appearance just stated, a party, who, on the day fixed, attended the Court and personally applied for an adjournment could not, in my opinion, be said not to have appeared. In such a case the requirements of the summons, so far as regards appearance, have-

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been fully complied with. The party has appeared in person: the purpose for which he appeared or the action which he took on appearance, is immaterial. Next, take the case in which, the party being absent, an application for adjournment is made on his behalf by a pleader who has no other instructions, and whose functions are at an end when the adjournment is refused. In such a case, has the party appeared within the meaning of Chapter VII? I think that he has not. Such of the requirements of the summons as relate to appearance have not been complied with. Appearance by a pleader within the meaning of the chapter does not, like appearance by a party in person, mean mere presence in Court: it means appearance "by a pleader duly instructed and able to answer all material questions relating to the suit." In the case supposed, the pleader is not "duly instructed," or instructed at all in the suit: he is instructed only to apply for an adjournment. He is not "able to answer all material questions relating to the suit": he knows nothing about such questions. So far as appearance by a pleader is concerned, Chapter VII, read in the light of section 61 and Form No. 117, does, in my opinion, "draw a distinction between appearances," and contemplates appearance by a pleader only if he is duly instructed and able as described. Lastly, take the case in which, the party being absent, the recognized agent is present. If the recognized agent accompanies a pleader who applies on the client's behalf for an adjournment, but who is otherwise uninstructed, then it is a question of fact whether the recognized agent is able to answer all material questions relating to the suit, in which case section 64 (*c*) and Form No. 117 seem to show that the party must be deemed to appear by the pleader. In such a case the requirements of the summons as to appearance are as fully satisfied as if the party had appeared in person and applied for an adjournment, and equally in such a case the purpose of the appearance, or the action taken on appearance, seems immaterial. It can hardly be suggested that the words in section 61 (*c*) and Form No. 117 "some other person able to answer all such questions" could not include a recognized agent. If, however, the party being absent, neither the pleader applying for adjournment, nor any person accompanying him, whether a recognized agent or

not, is able to answer all material questions relating to the suit, then, apart from section 36, there is no appearance within section 61 (c), Form No. 117, or Chapter VII; and the only remaining question is whether the party appears by his recognized agent under section 36. That is a question of fact. In connection with it, the ability or inability of the recognized agent to answer material questions is, of course, immaterial. But section 36 says only that any appearance required or authorized by law to be made by a party *may* be made by his recognized agent. It does not say that the presence of the recognized agent in Court is *necessarily* an appearance by the party. The section is purely enabling. Section 37 only defines the recognized agents by whom appearances *may* be made. If the recognized agent personally applied for an adjournment, that would, under section 36, be an application by the party, and such an application would include an appearance, as to which it is unnecessary to decide whether it would or would not constitute an appearance of the party within Chapter VII. But if the recognized agent neither made any application, nor did any act, the question would be not merely whether he was present in Court when the application for adjournment was made, but whether he intended to appear and in fact appeared for the party in the exercise of his power under section 36. If, at the time, he stated, either in answer to the Court or otherwise, that he appeared or that he did not appear for his principal, the question of the party's appearance would be definitely determined. If he made no such statement, the question might be difficult to determine; but in the absence of all evidence on the point, his presence at the time of the application should not, I think, be assumed to constitute an appearance by the party. It is likely enough that he might regard the pleader's appearance for the purposes of the application as sufficient, without any additional appearance by himself.

Applying these principles to the present case, the defendants in the suit and plaintiffs in the cross-suit did not on the 23rd April appear in person. They did not appear by their counsel within the meaning of section 157 and Chapter VII, because their counsel was neither duly instructed and able to answer all material questions relating to the suit, nor accom-

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panied by any other person who is shown to have been able to answer such questions. They did not appear by their recognized agent, because the recognized agent, though present, is not shown to have appeared under section 36 on his principal's behalf. The decree in the suit was, therefore, passed *ex parte*, and the cross-suit was dismissed for non-appearance, and the Fourth Judge was competent to make the order setting aside the decree and the dismissal. This view of the case is in accordance with *Bhimacharya Vyankatacharya* v. *Fakirappa Anandappa*[1]; *Shankar Dat Dube* v. *Radha Krishna*[2]; *Hira Dai* v. *Hira Lal*[3]; *Ramtahal Ram* v. *Rameshar Ram*[4]; and the *Administrator General of Bengal* v. *Lala Dyaram Das*[5], which was referred to apparently with approval by the Privy Council in *Sahebzada Zain-ul-Abdin Khan* v. *Sahebzada Ahmad Raza Khan*[6].

The only other point raised by the reference relates exclusively to the cross-suit. It arises in connection with section 38 of the Presidency Small Causes Courts Act (XV of 1882) as amended by Act I of 1895. That section provides that

"Where a suit has been contested, the Small Cause Court may, on the application of either party, made within eight days from the date of the decree or order in the suit (not being a decree passed under section 522 of the Code of Civil Procedure) order a new trial to be held, or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable, and may in the meantime stay the proceedings.

"*Explanation.*—Every suit shall be deemed to be contested in which the decree is made otherwise than by consent of or in default of appearance by the defendant."

What happened here was that, after the dismissal of the cross-suit, the plaintiffs made an application which is described in the reference as an application "for a rehearing of both suits." It is not stated that the application purported to be made under section 38; and I infer that the provision of law under which it was made was not mentioned. So far as it related to the cross-suit, it appears to have been treated by the Fourth Judge as made under section 103 of the Code. As the same application relate

(1) (1867) 4 Bom. H. C. Rep. (A. C.), 206
(2) (1897) 20 All., 195.
(3) (1885) 7 All., 538.
(4) (1886) 8 All., 140.
(5) (1871) 6 Ben. L. R., 688.
(6) (1878) 5 I. A., 233 at p. 237.

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to both the suit and the cross-suit, and, so far as regards the suit, could not have been made under section 38, it is probable that, as regards the cross-suit also, it was made not under that section, but under the Code. It was made on the 7th May, beyond the eight days' period mentioned in section 38, but within the thirty days' period prescribed by the Limitation Act for an application by a plaintiff under the Code for an order to set aside a dismissal by default.

It is, however, suggested in the reference that, as the cross-suit was "contested" within the definition contained in the explanation, the plaintiffs could only apply to the Court to set aside the dismissal within the eight days' period prescribed by section 38, and the question is raised whether section 38 is consistent with the application to the Small Cause Court of section 103 of the Code. In reply to this suggestion, Mr. Scott, who appeared on behalf of the plaintiffs in the cross-suit as *amicus curiæ*, contended that section 38 did not apply to an application to the Court to set aside a dismissal for default. He laid stress on the fact that a "contested" suit as defined in the explanation is a suit in which a "decree" is made, and he argued that a dismissal for default is not a "decree" as defined by section 2 of the Code, but only an order. Without, however, discussing that question, I observe that section 38 expressly includes applications to the Court to set aside "the decree or order in the suit," and as the explanation was clearly intended to be co-extensive with the first paragraph, I think that it must be held to include orders which at all events are so far in the nature of decrees that, unless and until set aside, they put an end to the whole suit.

But there is another and, I think, sufficient answer to the suggestion made in the reference. Section 37 enacts that "save as otherwise provided by this chapter, or by any other enactment for the time being in force, every decree and order by the Small Cause Court in a suit shall be final and conclusive." This saving includes Chapters VII and XIII of the Code, unless the procedure prescribed by them is inconsistent with that prescribed by any specific provision of the Presidency Small Cause Courts Acts, and also includes section 38 itself. That it includes to this extent

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Chapters VII and XIII appears from Rule I read with the schedule of the "Rules of procedure and practice of the Court of Small Causes at Bombay" framed by the High Court under section 9 of Act I of 1895. So far, then, as section 37 is concerned, the right of a plaintiff to apply to the Court under section 103 of the Code to set aside a dismissal for default, is expressly saved. The only specific provision of the Presidency Small Cause Courts Acts, with which it is suggested that such a right may be inconsistent, is section 38. I do not think that there is any such inconsistency. No doubt, as is pointed out in the reference, a suit which is dismissed for default is a "contested" suit within the explanation to section 38, and the section, therefore, applies to it. The explanation is in accordance with ordinary language. Whether a suit is contested or not, depends exclusively upon the defendant. The plaintiff does not "contest" his own suit, and if he fails to appear, the suit is nevertheless contested if the defendant resists it. The object of the Legislature was to give the right to apply for a new trial in all except undefended cases. But although section 38 includes cases to which section 103 of the Code applies, the two remedies are not inconsistent. As shown in several decisions, the jurisdiction under section 38 is revisional—*Sassoon* v. *Hurry Das Bhukut*[1], *Sadasook Gambir Chund* v. *Kannayya*[2]; *Srinivasa Charlu* v. *Balaji Rau*[3]. Whether in the exercise of its discretion under the section the Court would revise a dismissal for default in the manner contemplated by section 103 of the Code, is a question upon which I need express no opinion. In any event, I can see no inconsistency between the two provisions, and no reason why a plaintiff whose suit has been dismissed for default should not have two separate remedies under different enactments If the plaintiff chooses to apply for a new trial under section 38, he must do so within eight days. If he prefers to apply for an order setting aside the dismissal under section 103 of the Code, he can do so within thirty days. As most plaintiffs would probably do, the plaintiffs in this cross-suit have preferred the latter remedy.

(1) (1896) 24 Cal., 455. (2) (1895) 19 Mad., 96.
(3) (1896) 21 Mad., 232.

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Our answer to the question referred is that, in the circumstances stated, the suits must be considered as having been disposed of under sections 100 and 102 of the Civil Procedure Code, respectively and that whether or not they or either of them fall within the category of contested suits as defined by section 38 of the Presidency Small Cause Courts Act, the remedy under section 103 of the Code was open to the plaintiffs in the cross-suit. Costs will be costs in the case.

FULTON, J.:—I concur with my learned colleague in thinking that sections 37 and 38 of the Presidency Small Cause Courts Act (XV of 1882) do not affect the applicability of the provisions of sections 103 and 108 of the Civil Procedure Code (Act XIV of 1882) to suits in that Court. Section 37 expressly saves the provisions of other enactments and thus leaves untouched these sections of the Code which have been applied to the Small Cause Court. Section 38, if it applies to suits dismissed for default (on which point I think it unnecessary to give any opinion), may offer an additional remedy to the plaintiff, but does not deprive him of the rights conferred by section 103 of the Code.

I also concur in holding that the Fourth Judge had jurisdiction to deal with these suits as if the persons who were defendants in Suit No. 13201 and plaintiffs in Suit No 14128 had not appeared on the day of hearing. On that day their counsel, Mr. Dadysett, appeared accompanied by their recognized agent and applied for an adjournment. When this was refused, he retired, and the suits were proceeded with and disposed of.

The learned Chief Judge points out that Chapter VII of the Code does not recognize a limited appearance. This may be so, but it is so clearly settled by authority that when a counsel or a pleader appears merely for the purpose of asking for an adjournment, his application, if refused, does not prevent the suit being treated as disposed of *ex parte*, that it seems to be impossible to re-open the question. Mr. Justice Strachey has collected the authorities on the subject. I need, however, only refer to *Bhimacharya* v. *Fakirappa*[1] as being a decision of this Court given more than thirty years ago. But there still remains the

(1) (1867) 4 Bom. H. C. Rep. (A. C.), 206.

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question whether the fact that Mr. Dadysett was accompanied by the recognized agent distinguishes the case from the one just referred to. Whether this man was or was not able to answer all material questions, we have no means of knowing. But assuming that he was able, but for some reason did not think proper to conduct the case on behalf of his principals, his mere presence in Court would not, in my opinion, be an appearance in the suit. Section 36, as pointed out by my colleague, is permissive. An appearance may be made by a pleader or recognized agent; but it is evident that the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented.

Here Mr. Dadysett, though instructed to ask for an adjournment, was not instructed to appear at the hearing; and the recognized agent, though present in Court, was, it appears, unwilling to carry on the case. In these circumstances it seems to me that there was no appearance at the hearing of the defendants in Suit No. 13201 or by the plaintiffs in Suit No. 14928.

ORIGINAL CIVIL.

Before Sir Lewis Kershaw, Kt., Chief Justice, and Mr. Justice Fulton.

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BHAIJI BHIMJI, PLAINTIFF, *v.* THE ADMINISTRATOR GENERAL OF BOMBAY, DEFENDANT.*

Administrator General—Administrator General's Act (II of 1874), Secs. 17 and 18—Order to collect assets—Decree against deceased's estate passed prior to such order—Attachment of part of deceased's estate subsequently to above order—Claim of Administrator General prior to that of attaching creditor.

On the 16th April, 1898, the plaintiff obtained an *ex-parte* decree against the defendant as heir and legal representative of his deceased father. Previously to the date of the decree (*viz.*, on 4th March, 1898), an order had been made by the High Court under sections 17 and 18 of the Administrator General's Act (II of 1874), authorizing the Administrator General to collect the assets of the deceased and ordering him, if necessary, to take out letters of administration to his estate. On the 29th April, 1898, the plaintiff under section 268 of the Civil Procedure Code (Act XIV of 1882) attached certain money in the hands of a third party due to the deceased's estate. On the 2nd July, 1898, letters of administration were granted to the Administrator General.

* Small Cause Court Reference, No. 126 of 1898.

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Held that, as against the Administrator General, the attachment was void *ab initio*. At the date of the decree obtained by the plaintiff, the Administrator General was entitled by virtue of the High Court's order to take possession of the estate of the deceased. As soon as that order was made, his right to possession became paramount and excluded that of the defendant (the son of the deceased), who was then no longer entitled to recover payment of debts due to his father. A decree, therefore, subsequently obtained against the defendant could not, as against the Administrator General, confer any rights on the decree-holder, who could not stand in a better position than the defendant, his judgment-debtor. Under sections 278 and 280 of the Civil Procedure Code, the Administrator General had the right to have the attachment removed, because he was exclusively entitled, at first by reason of the order under section 18 of Act II of 1874 and subsequently by his letters of administration, to recover the debt, and was not subject to any decree which affected his title

Lalchand v. *Gumtibai*(1) distinguished,

CASE stated for the opinion of the High Court, under section 617 of the Civil Procedure Code (Act XIV of 1882), by C. W. Chitty, Chief Judge :—

"1. This was a suit brought by the plaintiff as creditor of one Devidas Khushal, deceased, against Kika Devidas, heir and legal representative of the said Devidas Khushal, to recover a sum of Rs. 1,115-10-0 and costs. Kika Devidas being a minor was sued by his guardian *ad litem*.

"2. On the 16th April an *ex-parte* decree was passed against the said Kika Devidas, and on 29th April an attachment was levied under section 268 of the Civil Procedure Code against a sum of money lying in the hands of Goverdhandas Govindji and due by him to the estate of the deceased Devidas Khushal.

"3. On the 4th March, 1898, an order had been made by the High Court under sections 17 and 18 of the Administrator General's Act (II of 1874), authorizing and enjoining the Administrator General to collect the assets and ordering him, if necessary, to take out letters of administration to the deceased's estate. On the 2nd July, 1898, such letters were granted to the Administrator General.

"4. On the 15th August, 1898, the Administrator General was brought on the record as party defendant, and a garnishee notice in respect of the said attachment came on for disposal.

(1) (1871) 8 Bom. H. C. Rep., 140 (O. C. J.).

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As the garnishee had not paid into Court the amount admitted by him to be due to the estate of the deceased, the notice was perforce discharged, but the question arose between the plaintiff and the Administrator General whether the attachment was not bad, and whether it ought not now, in any case, to be set aside. I held that the attachment could not now be set aside at the instance of the Administrator General, notwithstanding that the order under which he took out letters of administration was made under section 17 of the Act, and that there had also been an order under section 18.

"The facts of the case and the reasons for my decision are fully set out in my judgment, a copy whereof is hereto annexed and to which I crave leave to refer.

"The questions for their Lordships' consideration will be:—

"(1) Was the attachment bad *ab initio*?

"(2) If not, did it become bad by reason of the grant of letters of administration to the Administrator General under section 17 of the Administrator General's Act?

"(3) Can the Administrator General now claim to have the attachment set aside?

"6. The Administrator General has deposited in Court Rs. 50 to meet the costs of reference."

The following is the judgment of the Chief Judge referred to above:—

The plaintiff was a creditor of Devidas Khushal, who died in the month of November, 1896. On the 4th January, 1898, the plaintiff filed this suit against Kika Devidas as heir and legal representative of his father, Devidas Khushal, to recover the sum of Rs. 1,145-10-0 and costs. Kika Devidas being a minor was sued by his guardian *ad litem*, Kuverbai. On the 4th March, 1898, on the petition of J. Duxbury and Co, Limited, the High Court made an order under section 18 of the Administrator General's Act (II of 1874), authorizing and enjoining the Administrator General to collect and take possession of the assets of the said deceased, and by the same order directed him, if necessary, to apply for letters of administration of such assets under

section 17 of the Act. It does not appear that the plaintiff was aware of this order. On the 18th April, 1898, this Court passed a decree in the suit *ex parte* against Kika Devidas as heir and legal representative of his father, the said Devidas Khushal. On the 29th April, an attachment was levied under section 268 of the Civil Procedure Code against a sum of money, said to be Rs. 1,000, in the hands of Govardhandas Govindji and due by him to the deceased. On the 30th April, 1898, the Administrator General issued the usual notice by advertisement for creditors and debtors of the deceased. The notice must have been seen by the plaintiff, as on the 5th May his pleader wrote to the Administrator General to register his name as a creditor. On the 13th June, the Administrator General wrote to the plaintiff enquiring if his decree was *ex parte*. To this the plaintiff's pleader replied on the 1st July. On the 2nd July, 1898, letters of administration were issued to the Administrator General by the High Court. On the 22nd July, the usual garnishee notice was issued against the defendant then on the record, Kika Devidas, and the garnishee. On the 5th August, the garnishee appeared before me and wanted time to look into the accounts to ascertain the exact amount due to the deceased. The then defendant was not served, and as the plaintiff's pleader brought it to my notice that letters of administration had been granted to the Administrator General, and that he now represented the estate, I directed a notice to be issued to him to show cause why judgment should not be entered up against him at the suit of the plaintiff on the judgment obtained as aforesaid, and why execution should not issue thereon. On the 15th August, Mr. Motilal, for the Administrator General, appeared and consented to his name being brought upon the record as party defendant, and the matter was adjourned for a fresh garnishee notice to be served on the Administrator General in respect of the attachment already levied. That garnishee notice came on for disposal on the 22nd August, when Mr. Desai, for the garnishee, admitted Rs. 900 due to the estate of the deceased, but required time to pay. He was ordered to pay the amount into Court by Wednesday, the 24th August, and the matter was further adjourned to that day for argument. On the 21th August, the garnishee was absent, and had also made default in payment of

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the money. The usual order in that case would be to discharge the notice, and allow the prohibitory order to stand for some time to enable the plaintiff to take such steps as he might be advised. By consent, however of the parties, I heard their arguments on the points raised by the Administrator General, *viz.* whether the prohibitory order ought not in any case to be discharged as being bad against him *ab initio*, or at any rate from the date of his obtaining letters of administration. The point is one of some difficulty, and the decision is not likely to be of much practical value in the present instance, as it may be impossible to recover anything from the garnishee. At the same time it is a point of some importance, and one on which there ought to be a definite ruling. Mr. Carnac appeared to argue the matter, and he stated that had he been present on the 15th August, he would not have consented to his name being brought on the record, except on the condition that the suit should be treated as having been originally filed against him. Without conceding that he would have had the power to impose any such condition on the Court, I may say that Mr. Motilal, who then appeared for him, never suggested it, and his name was naturally inserted as party defendant as the person now representing the estate of the deceased. It was contended, in the first place, that the order of the High Court, of the 4th March, authorizing and enjoining the Administrator General to collect the assets, was equivalent to the order of the Insolvent Court vesting an insolvent's property in the Official Assignee, and that after such order no attachment could issue. This contention cannot, I think, prevail. The distinction between the offices of Official Assignee and Administrator General is well drawn by Westropp, C. J. (*Gemtibai's case*[1]). The wording of the two orders is entirely different. In my opinion, the Administrator General empowered under section 18 to collect assets is much more in the position of a receiver appointed under section 503 of the Civil Procedure Code, and the wording of those two sections seems to be in favour of this view. Then it was said that the grant of letters related back to the death of the deceased, and that no attachment could, therefore, be levied against such assets. In my opinion, this contention also fails. It is true that

(1) (1871) 8 Bom. H. C. Rep., 140.

since the decision at 8 Bom. H. C. Rep., 140, the Probate and Administration Act (V of 1881) has been passed and section 14 of that Act enacts that letters of administration entitle the Administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death, but there is no saving here as to the liabilities of the deceased's estate. It is not suggested that a creditor properly and *bonâ fide* paid in full before the grant of letters of administration to the Administrator General could be compelled to refund any part of the money so paid. If carried to its logical conclusion, this conclusion would have that effect. It would involve, too, the setting aside of the decree which Mr. Carnac admits that he cannot do. Kika Devidas at the date of suit and down to the issue of letters to the Administrator General represented the estate of the deceased according to Hindu law. He was properly sued in that capacity and the attachment when levied was properly levied against him, and it cannot now, I think, be set aside unless there is some provision in the Administrator General's Act to that effect. Section 35 was relied upon by Mr. Carnac. That section is explicit, but it appears to me to be inapplicable to this case, as it was to that decided by Sir M. Westropp. This suit was not brought against the Administrator General, nor did he represent the deceased or his estate at the date of filing the suit, or at the date of the attachment. Besides that section, I find nothing in the Administrator General's Act which would justify me in setting aside this attachment. It is true that a judgment-creditor has no priority over other creditors merely by virtue of his decree; but if a judgment or other creditor has legally and properly secured an advantage to himself, I am not aware that there is any authority for saying that he can be deprived of it by the grant of letters of administration to the Administrator General. Under these circumstances my decision must be in favour of the plaintiff. I have not come to this conclusion without some doubt, and I am glad that the matter should go before a higher tribunal. The general policy of the Act seems to be in favour of a rateable distribution among all creditors, but I find nothing in the Act to meet the state of the facts which has arisen here. My present order will be that the

garnishee notice be discharged and the attachment continued until the further order of this Court, to enable the plaintiff to take such steps as he may be advised. This order will be contingent on the opinion of the High Court on a case to be stated at the request of the Administrator General."

The Chief Judge further stated a supplementary case for the opinion of the High Court, as follows:—

"1. In this suit I have already submitted a case on certain questions arising between the plaintiff and the defendant. To that case and the copy of my judgment I would crave leave for brevity's sake to refer.

"2. It will be remembered that on the 22nd August, 1898, the garnishee appeared by his pleader Mr. Desai, and admitted that he owed Rs. 900 to the estate of the deceased Devidas Khushal. This he was ordered to pay into Court by the following Wednesday, 24th August, by an order in the following form:—

"Upon reading the Judge's summons issued herein dated the 15th day of August, 1898, and on proof of service thereof and on hearing Mr. Rele, pleader on behalf of plaintiff, and attorney Mr. Motilal for defendant and pleader Mr. Desai for garnishee, I do order that the said garnishee do out of the moneys in his hands pay into Court the sum of Rs. 900 (nine hundred) in respect of the decree herein on or before Wednesday 24th instant at 11 A.M.

"3. The notice as far as the questions between the plaintiff and defendant were concerned was adjourned to Wednesday, 24th August, for argument, and from that day to the 29th August for judgment. On neither of the two latter days did the garnishee appear, and the notice being of no further use as against him was marked as discharged. The order of the 22nd August, 1898, however, still stood against the garnishee.

"4. As the garnishee did not obey the said order, the plaintiff by his pleader Mr. Rele asked me to issue execution against the garnishee under the provisions of section 649 of the Civil Procedure Code. This I agreed, though not without hesitation, to do. An attachment by seizure was accordingly ordered, and the

garnishee paid the amount of the debt into Court under protest. He then moved the Full Court to set aside the order for attachment by seizure, alleging that the Court had no power to enforce the order of the 22nd August, 1898, in that way.

"5. The Second Judge and myself were of opinion that the Court had the power under section 619 to enforce its order, but as this was a most important point of practice we delivered no formal judgment, but I readily consented to submit this point also for their Lordships' consideration.

"6. It may be stated that the form of the order of the 22nd August, 1898, has already received judicial sanction in the case of *Toolsa Goolal* v. *John Antone*[1], and Sir Charles Sargent there distinctly laid down that this Court had power to make such an order. If this be so, it must, I submit, follow that such an order is enforceable, and if enforceable, then section 619 appears to be the proper section under which to enforce it.

"7. The sole question is whether such an order as is above set out is enforceable under section 619, and relatively under Chapter XIX of the Code of Civil Procedure."

Scott, for the plaintiff.

Lowndes, for the defendant.

The following authorities were referred to:—*Nilkomul* v. *Reed*[2]; *Remfry* v. *De Pennings*[3] *Emanuel* v. *Bridger*[4]; *Fowler* v. *Roberts*[5]; Administrator General's Act II of 1874, Secs. 17 and 18.

FULTON, J.:—The facts which have given rise to this reference are as follows:—

The plaintiff was a creditor of Devidas Khushal, who died in November, 1896. On 4th January, 1898, the plaintiff filed this suit against Devidas' minor son Kika as legal repesentative of his father.

On 4th March, the High Court made orders under sections 17 and 18 of Act II of 1874, directing the Administrator General, if

(1) (1887) 11 Bom., 448.
(2) (1872) 12 Beng L. R., 237.
(3) (1884) 10 Cal, 929.
(4) (1874) L. R., 9 Q. B., 286.
(5) (1860) 2 Giff., 226.

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necessary, to apply for letters of administration of the deceased's estate, and authorizing and enjoining him to collect and take possession of the assets.

On the 18th April an *ex parte* decree was passed against Kika as legal representative of the deceased.

On the 29th April an attachment was made, under section 268 of the Civil Procedure Code (Act XIV of1882), of a sum of Rs. 1,000 said to be due by one Govardhandas to the deceased.

On the 30th April the Administrator General issued the usual notice by advertisement for creditors and debtors of the deceased.

On the 5th May the plaintiff wrote to the Administrator General to register his name as a creditor.

On the 2nd July letters of administration were issued to the Administrator General.

Subsequently the Court issued notice to the Administrator General to show cause why judgment should not be entered up against him at the suit of the plaintiff on the judgment obtained as aforesaid, and execution should not issue thereon.

On the 15th August, Mr. Motilal appeared for the Administrator General and consented to his name being entered upon the record as a party-defendant.

Afterwards on Govardhandas admitting that he owed the amount, he was directed to pay into Court the sum of Rs. 900. Thereupon the Administrator General raised the question whether the attachment should not be set aside as being bad against him *ab initio*, or at any rate from the date of his obtaining letters of administration.

Then the learned Chief Judge of the Court of Small Causes referred the following questions:—

1. Was the attachment bad *ab initio* ?

2. If not, did it become bad by reason of the grant of letters of administration to the Administrator General under section 17 of the Administrator General's Act ?

3. Can the Administrator General now claim to have the attachment set aside ?

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To the first of these questions our answer is that against the Administrator General the attachment was bad *ab initio*.

The second, therefore, becomes superfluous.

To the third question our answer is in the affirmative.

In the case of *Lalchand* v. *Gumtibai* (1) it was held that, when a creditor had obtained a decree against the legal representative of a deceased Hindu as such, execution could be levied against the estate notwithstanding the subsequent grant to the Administrator General of letters of administration. The reason for the decision was that at the time of the decree the widow, against whom the suit was brought, fully represented the estate, and the letters of administration subsequently obtained did not, by relating back to the death of the deceased, override the decree obtained against her. The case occurred in 1871 before the enactment of section 11 of Act V of 1881, which perhaps leaves open to argument the question how far the decision is still binding. But on this point it is unnecessary for us to express any opinion, for that case is distinguishable from the present, inasmuch as in it, prior to decree, no order had been passed similar to the one here made under section 18 of the Administrator General's Act. At the time when that decree was passed, the Administrator General had no claim whatever to possession of the estate, which was wholly vested in the widow. In this case on the 16th April, when the decree was passed against the deceased's son, the Administrator General was entitled by virtue of an order made under section 18 to collect and take possession of the property of the deceased within the local limits of the ordinary civil jurisdiction of the High Court, and if necessary to maintain a suit for its recovery. As soon as that order was made, his right to possession became paramount and excluded that of deceased's son, who was no longer entitled to receive payment of debts due to his father. From that time forward it was to the Administrator General, and not to the deceased's son, that the debtor was bound to make payment. Therefore, a decree subsequently obtained against the son could not, as against the Administrator General, confer any rights on the decree-holder, who could not stand in a better position than his judgment-

(1) (1871) 8 Bom H. C. Rep., 140 (O. C. J.)

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debtor. How far the position of the parties would have been changed if the Administrator General had been made a defendant prior to decree, it is unnecessary to decide, though the case of *Hanimabalu* v. *Cook* [1] may be referred to on the point. But the entry of his name as a party-defendant after decree could not under the Code of Civil Procedure subject him to any liability, nor was it contended in argument that such would be the case.

Mr. Scott referred to the cases of *Fowler* v. *Roberts* [2] and *Burton* v. *Roberts* [3], but they merely showed that in England a judgment-creditor, who had obtained a decree and attachment of a debt in a suit against an executor before the rights of the latter were superseded under an administration decree, could enforce payment from the garnishee. In *Emanuel* v. *Bridger* [4], which was also cited, it was held that a creditor who had obtained and made absolute a garnishee order, before the bankruptcy order, had a charge to the extent of the attachment on the bankrupt's estate. But cases of this sort do not touch the point now under consideration. Here the Administrator General's rights had accrued before decree: the defendant at the time when the decree was passed merely represented the deceased's estate subject to those rights: and those rights could not be impaired by a decree to which the Administrator General was not a party.

The learned Chief Judge noted that it was not proved that plaintiff had notice of the order under section 18. But that does not seem to make any difference. There is nothing in the section to postpone the title of the Administrator General till notice has been given. If it be argued that such a construction involves hardship on the plaintiff, it may be answered that we are not at liberty to alter the wording of the section, and, moreover, that if the plaintiff's decree were to prevail, the hardship to other creditors might be still greater. If the estate were insolvent, in which case alone could the question be of any importance, the recognition of priority in the plaintiff's decree would lead to his being paid in full out of moneys in which in equity all the creditors were entitled to share rateably. Such a result would be contrary to the intention of the Administrator

(1) (1871) 6 Mad. H. C. Rep., 346.
(2) (1860) 2 Giff., 226.
(3) (1860) 29 L. J., Exch., 484.
(4) (1874) L. R., 9 Q. B., 287.

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General's Act and to the principle enunciated by Westropp, J., in *Gamble* v. *Bholagir*[1] in which his Lordship said: "We think it more agreeable to the justice and equity of the case that there should be a distribution of the property of an insolvent amongst his creditors at large than that individual creditors should carry off the whole fund."

In these circumstances it appears clear that under sections 278 and 280 of the Civil Procedure Code the Administrator General has a right to have the attachment removed, because he was exclusively entitled, at first by reason of the order under section 18 and subsequently by his letters of administration, to recover the debt, and was not subject to any decree which affected his title.

The supplementary question whether the order made to the debtor to pay the money into Court, can be enforced under section 649, and relatively under Chapter XIX of the Civil Procedure Code, does not, therefore, arise. We accordingly abstain from expressing any opinion on it. Costs of this reference to be costs in the case.

Attorney for plaintiff:—Mr. *D. Barjonji.*

Attorneys for defendant:—Messrs. *Bicknell, Merwanji and Motilal.*

(1) (1866) 2 Bom. H. C. Rep., 116 at p. 161.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

QUEEN-EMPRESS v. CHAGAN JAGANNATH.*

1898.
September 1.

*Criminal Procedure Code (Act X of 1882), Sec. 423—Appellate Court—Powers of appellate Court to enhance sentence—Sentence—Alteration of sentence.**

The accused was convicted of criminal breach of trust and sentenced to nine months rigorous imprisonment. On appeal, the conviction was upheld, but the sentence was altered to one of six months' rigorous imprisonment and a fine of Rs. 1,000, or, in default of payment, three months' further rigorous imprisonment. The accused applied to the High Court in revision, contending that the alteration of the sentence amounted to an enhancement of the sen-

* Criminal Revision, No. 207 of 1898.

tence beyond the powers of the appellate Court under section 423 of the Cod of Criminal Procedure (Act X of 1882).

Held, that there was no enhancement of the sentence.

Queen-Empress v. *Ishri* Distinguished.

APPLICATION under section 435 of the Code of Criminal Procedure (Act X of 1882).

The accused was convicted by the First Class Magistrate of Broach of criminal breach of trust in respect of a sum of Rs. 725 and sentenced to nine months' rigorous imprisonment.

On appeal, the Joint Sessions Judge upheld the conviction but altered the sentence of nine months' rigorous imprisonment to one of six months' rigorous imprisonment and a fine of Rs. 1,000, or, in default of payment, three months' further rigorous imprisonment.

The accused applied to the High Court under its revisional jurisdiction, contending that the alteration of the sentence in appeal amounted to an enhancement of the sentence, which was illegal, and *ultra vires* of the appellate Court.

N. G. Chandavarkar, for the accused.

Rão Bahádur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

ever, to deal with the case as involving a point of law, and looked at in that light we think that we cannot yield to the contention. A sentence of fine is always considered lighter than a sentence of imprisonment. A sentence, therefore, of a fine of Rs. 1,000 would not be so severe as a sentence of three months' rigorous imprisonment, and the substitution of the former for the latter would not be an enhancement. The sentence of three months' rigorous imprisonment, in default of payment, does not make the whole sentence of imprisonment larger than it was before In a case which came before the Madras High Court, (which has not been reported, but the record of which has kindly been sent to us—Criminal Revision Case No. 460 of 1888 decided on the 27th August, 1888), where the original sentence of three months' rigorous imprisonment had been altered to one of two months' rigorous imprisonment and Rs. 30 fine, in default one month's additional rigorous imprisonment, Shepherd J., passed the following decision:—"I do not think that there is any enhancement of the sentence. If the accused is in a position to pay the fine, and does pay it, the nature of the sentence is altered, but the sentence is not enhanced. If he cannot and does not pay the fine, the sentence remains unaltered." The case of *Queen-Empress* v. *Ishri* [1] is not an authority to the contrary, for there the term of imprisonment *plus* the additional imprisonment in default of the payment of the fine exceeded the original term, and the altered sentence was on that account held to be an enhanced one.

We follow the decision of the Madras High Court and reject the application.

(1) (1894) 17 All., 67

In execution of a decree the plaintiff made an application which was refused by the Subordinate Judge on the 18th December, 1897. The judgment was delivered on that day, but the bill of costs (the order as to costs being a part of the order or decree) was not signed until the 18th January, 1898.

The plaintiff proposed to appeal, and for that purpose applied on the 11th January, 1898, for copies of the judgment and order. These copies were furnished to him on the 24th January, 1898.

The plaintiff presented his appeal on the 21th February, 1898, but the Judge rejected it, holding that it was barred by limitation, not having been presented within thirty days from the date of the order (article 152 of the Limitation Act XV of 1877). In his judgment he said:—

"Allowing for the interval between application for copy of the order (dated 18th December), which was made on the 11th January and the date of granting copy, 24th January, this appeal is barred by time The fact that the bill of costs, dated 18th December, was not signed by the Subordinate Judge till the 18th January, has nothing to do with the delay in making this appeal."

The plaintiff appealed to the High Court against this order rejecting his appeal.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

1898. September 13.

YAMAJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* ANTAJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation—Appeal—Limitation Act (XV of 1877), Sec. 12, Sch. II, Art. 152 Civil Procedure Code (Act XIV of 1882), Sec. 205—Date of judgment—Date of decree—Bill of costs signed subsequently—Time requisite for obtaining copy of the decree—Time between pronouncement of judgment and signing of the decree—Practice.

The time for presenting an appeal against a decree or order is thirty days from the date of such decree or order (article 152 of the Limitation Act, XV of 1877). The date of the decree or order is the date on which judgment is pronounced.

The time excluded from the period of limitation by section 12 of the Limitation Act must be taken to commence only when the party appealing does something in order to obtain the copy of the judgment or decree, and to end when he obtains the copy. A party who delays to apply for such copy is not entitled to exclude the period of such delay.

A party is at liberty to apply for a copy of the decree, whether the decree has been signed or not. If he has applied, but the copy cannot be prepared because the decree has not been signed, then this time and the time taken up in preparing the copy will be excluded, but so long as he has made no application, the non-signature of the decree can have no effect at all upon him.

Judgment was pronounced on the 18th December, 1897, rejecting an application made by a plaintiff in execution of a decree; but the bill of costs (the order as to costs being a part of the order or decree) was not signed until 18th January, 1898. The plaintiff proposing to appeal against the above order applied for copies of the judgment and order on the 14th January. The copies were furnished to him on the 24th January, 1898. The appeal was presented on the 24th February. The lower Court held the appeal barred by limitation under article 152 of the Limitation Act, not having been presented within thirty days from the date of judgment. On appeal to the High Court,

Held, that the appeal was barred. The only time allowed by Law to be excluded was from the 14th January, 1898, on which date copies of the judgment and order were applied for to the 24th January 1898, on which date they were furnished. The judgment was pronounced on the 18th December, 1897. The non-signing of the decree was no cause for or explanation of the delay between that date and the 14th January, 1898, or for the delay between the 24th January, 1898, and the 24th February, 1898.

* Second Appeal, No. 373 of 1898.

1898.

YAMAJI v. ANTAJI.

In execution of a decree the plaintiff made an application which was refused by the Subordinate Judge on the 18th December, 1897. The judgment was delivered on that day, but the bill of costs (the order as to costs being a part of the order or decree) was not signed until the 18th January, 1898.

The plaintiff proposed to appeal, and for that purpose applied on the 11th January, 1898, for copies of the judgment and order. These copies were furnished to him on the 24th January, 1898.

The plaintiff presented his appeal on the 21th February, 1898, but the Judge rejected it, holding that it was barred by limitation, not having been presented within thirty days from the date of the order (article 152 of the Limitation Act XV of 1877). In his judgment he said:—

"Allowing for the interval between application for copy of the order (dated 18th December), which was made on the 11th January and the date of granting copy, 24th January, this appeal is barred by time. The fact that the bill of costs, dated 18th December, was not signed by the Subordinate Judge till the 18th January, has nothing to do with the delay in making this appeal."

The plaintiff appealed to the High Court against this order rejecting his appeal.

Balaji A. Bhagvat, for the appellant (plaintiff):—The appeal is not barred. Article 152 allows thirty days from the date of the order or decree, and not from the date of the judgment—*Bani Madhub* v. *Mahangini Dassi* [1]. Here there was no order against which an appeal could be made until it was signed. That was not done until the 18th January, 1898 (Civil Procedure Code, Act XIV of 1882, Sec. 205). It was then that the time began to run against the appeal. But we are entitled to exclude the time necessary to obtain copies of the judgment and order. See section 12 of the Limitation Act. They were obtained on the 24th January, 1898. We filed the appeal on the 24th February, which was within thirty days from that date; and, therefore, the appeal is not barred.

Sadashiv R. Bakhale, for the respondents (defendants):—The date of the decree or order must be the date on which the judgment was given (section 205 of the Civil Procedure Code).

(1) (1886) 13 Cal. 104.

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That was the 18th December, 1897. The appeal was not presented until the 24th February and, therefore, is barred—*Bechi* v. *Ahsan-Ullah*[1]. The words "date of decree" are explained in *Golam* v. *Goljan*[2]. The plaintiff is not entitled to any indulgence, as he obtained the copies on the 24th January, 1898, but delayed for a month after that date.

PARSONS, C. J. (ACTING):—Judgment in this case was pronounced on the 18th December. The appellant applied for a copy of the decree on the 14th January, and it was furnished to him on the 21th January. He presented an appeal against the decree on the 24th February, and the District Judge rejected it, holding it to be time-barred.

It has been argued before us that the District Judge is wrong, since the decree was not signed until the 18th January, and, under the ruling of the Calcutta High Court, (subsequently noted,)[3] the time between the 18th December and the 18th January and the time between the 18th and the 24th January ought to be excluded. The Judge has noticed the fact that in this case the decree, which was an order passed in execution, was really signed on the 18th December, and that it was the bill of costs only which was signed on the 18th January, and held that the delay in signing the latter had nothing to do with the delay in making the appeal. As, however, the decree has to state the amount of costs and by what parties and in what proportion they are to be paid, the possible distinction that there may be between a decree and an order in execution does not seem to us to be very material. The point is whether an appellant is entitled to deduct the time between the pronouncement of the judgment and the signing of the decree in computing the period of limitation prescribed for an appeal.

The Limitation Act, 1877, article 152, prescribes the time for presenting an appeal to be thirty days from the date of the decree or order appealed against. It is clear that the date of the decree must be taken to be the date on which the judgment was pronounced. This is the language of section 205 of the Civil Procedure Code, and it has been so decided by both the Calcutta and Allahabad

(1) (1890) 12 All., 461. (2) (1897) 25 Cal., 109.
(3) (1886) 13 Cal., 104.

High Courts—*Bani Madhub Mitter* v. *Matungini Dassi*[1]; *Golam Gaffar Mandal* v. *Goljan Bibi*[2]; *Bechi* v. *Ahsan-Ullah Khan*[3]. An extension of this time, however, is allowed by section 12 of the Act, which says that in computing the period of limitation prescribed for an appeal the time requisite for obtaining a copy of the decree or order appealed against shall be excluded. In construing these words, the Calcutta High Court has held in *Bani Madhub* v. *Matungini Dassi*, that as, until a decree is signed, no copy of it can be obtained, the time between the judgment and the existence of the decree as a signed decree ought to be excluded in computing the time taken in presenting an appeal. We think that this construction gives these words too large and extended a meaning. The time requisite for obtaining a copy must, in our opinion, be confined to the action of the party who wishes to obtain the copy, and must be taken to commence only when he does something in order to obtain the copy and to end when he obtains the copy. We fail to see how any delay in signing the decree can be brought in to benefit a person who has not made any application to obtain a copy, or how it can be said that the time during which the delay lasted was time requisite for him to obtain a copy. It might be so, if in some way or other it prevented him from asking for a copy, but this it certainly need not do. A party is at liberty to ask for a copy of the decree whether the latter is signed or not. If he has made the application and the copy cannot be prepared because the decree has not been signed, then, of course, this time and the time taken up in preparing the copy will be excluded, but as long as he has made no application, the non-signature of the decree can have no effect at all upon him. It will be found, we think, in most cases that a party is quite ignorant when the decree is actually signed. The decision of the Full Bench of the Allahabad High Court in *Bechi* v. *Ahsan-Ullah Khan*[3] seems to us to be correct upon this point.

In the present case, although the judgment was pronounced on the 18th December, the application for a copy was not made until the 14th January, and, when the copy was obtained as it was on the 24th January, the appeal was not presented until the 24th February.

(1) (1886) 13 Cal., 104. (2) (1897) 25 Cal., 109.
(3) (1890) 12 All., 461.

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The only time allowed by law to be excluded is that from the 14th to the 24th January. The non-signing of the decree is no cause for, and no explanation of, the delay between the 18th December and the 14th January and between the 24th January and the 24th February. We dismiss the appeal with costs.

Appeal dismissed.

CRIMINAL REFERENCE.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898. September 5.

THE MUNICIPALITY OF WA'I v. KRISHNAJI GANGADHAR.*

Municipality—House tax—House valuation—Valuation made by Municipality—Magistrate's power to revise the valuation—Bombay District Municipal Act (Bom. Act VI of 1873), Sec. 84, as amended by Bombay Act II of 1884.

Under the rules passed under the Bombay District Municipal Act (Bom. Act VI of 1873) as amended by Bombay Act II of 1884 the Municipality of Wái estimated the annual letting value of a house belonging to the accused at Rs. 50 and levied a house tax of Rs. 2-8. A, a tax-payer, applied to the managing committee for a reduction of the tax, but his application was dismissed. Default having been made in payment of the tax, A was prosecuted under section 84 of the Act before a Second Class Magistrate. He contended that the estimate made by the Municipality was too high, and that his house would not let for more than 10 or 12 Rs. a year. The Magistrate took evidence on the point and found that the annual rental of the house would not exceed Rs. 12, and he ordered payment of 12 annas only on account of the tax.

Held, that the Magistrate had no power to go behind the estimate of value framed by the managing committee under the powers given to it by the rules. He ought to have accepted as conclusive the amount found by the managing committee to be the letting value of the house, and held the legal liability of the accused to pay the tax based on this amount to be proved.

The remedy of the accused, if he considered his house assessed too highly, was to apply to the managing committee, and no other mode of redress was open to him.

Municipality of Ahmedabad v. *Jumna Punja*(1) and *Imperatrix* v. *Nathu Hirachand*(2) distinguished.

REFERENCE under section 438 of the Code of Criminal Procedure (Act X of 1882) by C. G. Dodgson, District Magistrate of Sátára.

*Criminal Reference, No 67 of 1898.

(1) (1891) 17 Bom., 731. (2) Cr. Rul. No. 35 of 1891.

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The Municipality of Wái applied to a Second Class Magistrate, under section 84 of the Bombay District Municipal Act (Bom. Act VI of 1873) as amended by Bombay Act II of 1884, to recover Rs. 2-8, being the amount of a house tax imposed on a house belonging to the accused Krishnaji Gangadhar Raste.

Krishnaji contended that the assessment fixed by the Municipality was too high, that the annual rental of his house on which the assessment was fixed was Rs. 10 or 12 and not Rs. 50 as estimated by the Municipality, and that he was not liable to pay the amount claimed by the Municipality.

The Magistrate took evidence upon the point and found that the annual rental of the house did not exceed Rs. 12. He, therefore, ordered Krishnaji to pay 12 annas only on account of the tax, instead of Rs. 2-8 as claimed.

The District Magistrate was of opinion that the trying Magistrate had no power to revise the assessment fixed by the Municipality and reduce the tax from Rs. 2-8 to 12 annas. He, therefore, referred the case to the High Court.

The reference was as follows :—

"The Magistrate has declined in this case to order the levy of the house tax on the ground that the tax has not been properly assessed. The municipal bye-law requires the house tax to be fixed on the rental value of the house. The Magistrate considers that the basis of the assessment has in reality been the value of the house itself, and he has, therefore, decided that the tax is not recoverable.

"In my opinion, the Second Class Magistrate is wrong. He has set himself up as an appellate Court for hearing decisions against the house tax assessments of the municipal committee. As I understand the law, the right procedure is for the tax to be assessed by the managing committee of the Municipality on behalf of the general committee, the right of appeal lying to the general committee. In case a taxpayer is dissatisfied with the decision of assessment imposed by the general committee he should either apply to the Collector to take action under section 37 or 39 or to Government under section 41 of Bombay Act II of 1884. A Magistrate proceeding under section 84 of Bombay Act VI of 1873 should, in my opinion, only consider whether the order contravened is a legal one or not. He is not concerned with the administrative reasoning or argument which may have led the municipal committee to pass the order in question.

"The rules of the Wái Municipality regarding the levy of house tax were sanctioned by Government in Government Resolution No. 1876, dated 21st May 1894."

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MUNICIPALITY OF WA'I v. KRISHNAJI LAMGADHAR.

The reference came on for hearing before a Division Bench (Parsons and Ranade, JJ.).

S. R. Bakhle for the Municipality.

M. V. Bhat for the accused.

PARSONS, J.:—By the rules framed under the Bombay District Municipal Acts, the Municipality is empowered to levy house tax on a certain scale according to the annual letting value of the house. The "letting value" is defined to mean the annual rent for which the house might be reasonably expected to let from year to year if the tenants were liable for all repairs; and Rule 3 provides that an estimate of the annual letting value of each house shall be made by the managing committee and published not later than the 15th March in each year (the tax being payable on the 31st May) and that applications for the reduction of the estimates by persons made liable may be presented to, and shall be disposed of by, the managing committee. It is proved that the estimate made by the managing committee of the annual letting value of the house of the accused was Rs. 50; and his application for a reduction was dismissed by the managing committee. When prosecuted for the amount of the tax he contended before the Magistrate that the estimate was too high and that the house would not let for more than Rs. 10 or 12 a year. The Magistrate took evidence on this point and found that the annual rental would be Rs. 12 only, and he ordered payment of 12 annas on account of tax instead of the Rs. 2½ claimed. In our opinion, the Magistrate had no power to go behind the estimate of value framed by the managing committee under powers given to it by the rules. The remedy of the accused, if he considered his house assessed too highly, was to apply to the managing committee, and no other mode of redress seems open to him under the rules. In the case of the *Municipality of Ahmedabad* v. *Jumna Punja* [1], where the legal liability depended upon the possession of a *khálkundi* and a tub, and there was no provision for the determination of this point by the Municipality, we held that the Magistrate should himself determine the point. This is doubtless good law. In criminal references Nos. 119 and 120 of

[1] (1891) 17 Bom., 731.

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1891 [1] the legality of the assessment depended upon the amount of the earnings of the family and its possessing *khálkuwas* or *khalkundis*. In our judgments we say "Neither in the Municipal Acts nor in the rules framed thereunder was there any machinery provided by which the amount of the earnings of the family or the question of its possession of *khálkuwas* or *khálkundis* could be determined by the municipal authorities. Nor is there any mode provided by which a person assessed to pay the cess in question at a certain rate can contest that assessment before a municipal or other civil authority." It was obvious, therefore, that the Magistrate had to determine the point before he could hold legal liability proved. In the present case also the question of legal liability for a certain amount of tax has to be determined by the Magistrate and he has to determine it upon the value of the premises of the accused. The determination, however, of this value is not placed in his hands. The rules provide for this value being estimated by the managing committee, and a mode of redress against over-valuation is provided by application to the managing committee. In such a case the Magistrate ought to have accepted as conclusive the amount found by the managing committee to be the letting value of the house and held the legal liability of the accused to pay the tax based on this amount to be proved. He had no power to review the decision of the managing committee, and reverse it on fresh evidence taken before himself.

We must, therefore, in this and the two other similar cases direct the Magistrate to order the recovery of the full amount claimed by the Municipality in each case.

[1] Cr. Rul No. 35 of 1891.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

1898. September 26.

RAMCHANDRA DHONDO AND ANOTHER (ORIGINAL PETITIONERS), APPLICANTS, *v.* RAKHMABAI AND OTHERS (ORIGINAL OPPONENTS), OPPONENTS.*

Civil Procedure Code (Act XIV of 1882), Sec. 310A—Act V of 1894—Execution sale—"Person whose immoveable property has been sold"—Prior private purchaser of property sold in execution not within the section.

A person who has purchased property which is afterwards sold in execution of a decree obtained against his vendor, is not entitled under section 310A of the Civil Procedure Code (Act XIV of 1882) to have the execution sale set aside.

APPLICATION under the extraordinary jurisdiction of the High Court, section 622 of the Civil Procedure Code (Act XIV of 1882).

The applicants applied to the Subordinate Judge of Chikodi to have a sale in execution set aside under section 310A of the Civil Procedure Code.

The property in question was sold on 1st April, 1898, in execution of a money decree against Rakhmabai and was purchased by opponent No. 2. The applicants, however, alleged that Rakhmabai had previously sold this property to them under a duly registered deed of sale dated 11th August, 1890, and they accordingly applied to have the execution sale set aside under section 310A, Civil Procedure Code (Act XIV of 1882).

That section provides as follows:—

"Any person whose immoveable property has been sold under this chapter may at any time within thirty days from the date of sale apply to have the sale set aside on his depositing in Court, &c., &c."

The Subordinate Judge rejected the application, holding that the section did not apply. The applicants thereupon obtained a rule from the High Court to set aside the order of the Subordinate Judge.

Mahadev V. Bhat for the applicants in support of the rule:—He relied on *Vithu* v. *Damodar*[1].

Gokuldas K. Parakh, for the opponents, showed cause:—The applicants do not belong to the class of persons referred to in

*Application, No. 128 of 1898 under the extraordinary jurisdiction.

(1) P. J. for 1895, p. 200.

the section, and they cannot apply under it. Similar words are used in section 311, and the cases upon that section apply to this case—*Bisheshar Kuar* v. *Hari Singh*[1]; *Asmatunnissa* v. *Ashruff Ali*[2]; *Ramchandra* v. *Gokul*[3]; *Timmanna* v. *Mahabala*[4].

PARSONS, C. J. (ACTING) :—The words "person whose immoveable property has been sold" used in section 311 of the Code of Civil Procedure had received a judicial meaning long before section 310A was added to the Code. (See *Asmatunnissa Begum* v. *Ashruff Ali*[5]; *Bisheshar Kuar* v. *Hari Singh*; *Timmanna* v. *Mahabala*[7]; and *Ramchandra* v. *Gokul*[8].) By employing the same words in section 310A the Legislature may be presumed to have intended them to bear the same meaning. It is argued that the words are of wide and general import and mean any person whose property has been sold. They may mean this, but then it has to be seen whose property has been sold *under this Chapter*, for these last three words must have a meaning also. It is only the judgment-debtor's right, title and interest in any property or the right, title and interest therein of any other person bound by the decree that can be sold under Chapter XIX in execution of a decree. In the present case there was a money decree passed against Rakhmabai in execution of which the property was attached as hers, and her right, title and interest therein was sold on the 1st April, 1898, and purchased by the opponent. It is the applicant's case that he bought it on the 11th August, 1890, that is, long before the suit was filed against Rakhmabai. It is thus clear that, even assuming the property as his, it has not been sold as his, and that he does not come within the meaning of the words "person whose immoveable property has been sold under this Chapter." In the case of *Vithu* v. *Damodar*[9], the applicant was rightly held to be the owner of the property, since he was bound by the decree, and the sale had disposed of his right of redeeming the property. We, therefore, discharge the rule with costs.

(1) (1882) 5 All., 42.
(2) (1888) 15 Cal., 488.
(3) P. J., 1891, p. 309.
(4) (1895) 19 Mad., 167.
(5) (1888) 15 Calc., 488.
(6) (1882) 5 All., 42.
(7) (1895) 19 Mad., 167.
(8) P. J. for 1891, p. 309.
(9) P. J. for 1895, p. 200.

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RANADE, J.:—The decision of this application turns upon the construction of section 310A introduced into the Code of Civil Procedure by the amending Act V of 1894. There have been only two decisions of this Court on that section. In one of them, *Ex parte Dandekar*[1], it was held that the words "any person whose immoveable property has been sold" included other persons than the judgment-debtor, and that the applicant in that case (who was purchaser from one of two brothers, both of whom had mortgaged the property to a creditor who sold the property in execution of his decree obtained against the brothers and applicant, who was made a co-defendant) was a person who was entitled to apply under section 310A. In the other case, a co-sharer in the property sold was held not to be entitled to apply under section 311—*Ramchandra* v. *Gokul*[2]. In two Madras cases in which the new section was considered, the applicant was the judgment-debtor himself—*Rangasami* v. *Narasimma*[3]; *Muthu Aygar* v. *Ramasami*[4]. The Calcutta High Court has considered this section, as also a similar section of the Bengal Tenancy Act (section 174) in many cases, but the point considered had reference chiefly to the question whether the section conferred a new right, or effected a change of procedure only, and, therefore, was or was not retrospective in character —*Jogendra Singh* v. *Amrita Lal Sircar*[5]; *Girish Chundra* v. *Apecia Krishna*[6]; *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy*[7]; and *Uda Ali* v. *Ram Komal*[8].

The effect of the corresponding words used in section 311 was considered in *Abdul Huq* v. *Mohini Mohun*[9], and it was held that the words "any person whose immoveable property has been sold" include a person who alleges that he is the owner of the property, even though he is neither the judgment-debtor, judgment-creditor, or auction-purchaser. The correctness of this decision was questioned in *Asadunnissa Begum* v. *Ashruff Ali*[10], and it was held by the Full Bench in that case that a

(1) P. J. for 1895, p. 240.
(2) P. J. for 1891, p. 304.
(3) (1893) 18 Mad., 477.
(4) (1895) 20 Mad., 158.
(5) (1895) 22 Cal., 767.
(6) (1891) 21 Cal., 949.
(7) (1887) 14 Cal., 636.
(8) (1888) 15 Cal., 383.
(9) (1886) 14 Cal.,240.
(10) (1888) 15 Cal., 488.

person who claims to be a purchaser of the judgment-debtor's rights at a prior execution-sale was not a person who could apply under section 311 of the Code. A person claiming by a title paramount to the judgment-debtor is not a person within the terms of the section, as his rights are not affected by the sale. The Madras High Court followed this ruling in *Subbarayadu* v. *Pedda Subbarazu*[1]. In a previous decision of the Calcutta High Court on section 311 of the Code, *In the matter of the petition of Bhagabuti Churn Bhuttacharjee*[2], it was held that though the words used in section 311 were not confined to the judgment-debtor, they did not include a person who had purchased at a prior execution-sale. A mortgagee decree-holder was held to be a person who could apply under section 311 of the Code to set aside the sale—*Rakhal Chunder Bose* v. *Dwarka Nath Misser* [3]. These decisions were all considered by a Full Bench of the Calcutta High Court in *Abdul Gani* v. *Dunne*[4], followed by the Madras High Court in *Timmanna* v. *Mahabala*[5]. In the Calcutta case, Petheram, C J., held that section 311 did not exclude a person whose interest would pass by the sale. Mr. Justice Ghose stated that the test to be applied was whether the applicant would have been entitled to bring a suit to contest the sale, or to recover the property.

These decisions on section 311 must govern the interpretation to be put on the similarly worded section 310A. In the absence of any ruling of this Court to the contrary, we must accept these decisions of the High Courts of Madras and Bengal, and hold that the applicant in the present case, who is a prior private purchaser from the judgment-debtor, is not a person who comes within the purview of section 310A. As his interests were not affected by the execution sale, his application was very properly rejected by the lower Court. We must discharge the rule.

Rule discharged.

(1) (1892) 16 Mad., 476.
(2) (1832) 8 Cal., 367.
(3) (1886) 13 Cal., 316.
(4) (1892) 20 Cal., 418.
(5) (1895) 19 Mad, 167.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

1898. *September* 26.

TUKARAMBHAT (ORIGINAL DEFENDANTS NOS. 2—5), APPELLANTS, *v.* GANGARAM MULCHAND GUJAR (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Joint family—Surety—Father's liability as surety—Liability of his sons for the debt for which he was surety.

Ancestral property in the hands of sons is liable for a father's debt incurred as a surety.

REFERENCE by F. C. O. Beaman, District Judge of Belgaum, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff sued to recover from the defendants Rs. 388, the price of grain supplied to the first defendant, who was a Mahomedan. The other defendants (Nos. 2—5), who were Bráhmins, were the sons of the deceased surety of defendant No. 1. The Subordinate Judge passed a decree awarding the claim. On appeal by defendants Nos. 2—5 the Judge made a reference to the High Court in the following terms:—

"This is an important question of law which has never yet been decided by our High Court, except in one early case to which I have no means of access. That question is, whether ancestral property in the hands of sons is liable to a father's debt incurred as a surety?

"In this case the father, a Bráhmin, stood surety for a Mussalmán.

"Mayne says (para. 279) 'The sons are not compellable to pay sums due by their father.....for which he was a surety (except in the cases before mentioned).' What these cases are, does not very clearly appear, unless they are intended to be included in the general principle of pious obligation. That, however, begs the whole question. Jagannath, who is not of high authority in this Presidency, denies that a son is not liable for the debt of his father incurred as a surety. Whence it might be inferred that earlier commentators had so affirmed. In a foot-note Mayne says 'As regards suretyship, the son's liability has been expressly affirmed—*Moolchund* v *Krishna*(1); *Sitaramayya* v. *Venkatramanna*(2).' The first case is that to which I have once referred. Mofussil Courts are not furnished with Bellasis' Reports. But it must have been decided comparatively long ago and before the law of this Presidency had been moulded by the minds of successive great Judges into its present form. The latter case was decided by Muttusami Ayyar and Parker, JJ., and is a very inadequate authority. The point now in issue was conceded at their Lordships' bar, and the

* Civil Reference, No. 5 of 1898.

(1) (1844) Bellasis Reports, 54. (2) (1888) 11 Mad., 373.

issue to be tried was limited to whether that case was maintainable under the Contract Act. It is submitted that the question is still open to Bombay. I may add that the judgment contains this passage: 'The decision of the Subordinate Judge rests on the ground that ancestral property inherited by a son from his father ought to be treated as assets available for the payment of the father's debts neither vicious nor immoral, and that the debt incurred by him as surety for the repayment of a loan is within the scope of that obligation.'

"The Smritis of Manu and Yájnavalkya, Brihaspati and the Mitákshara support the decision, and that in Bhattacharji's Hindu Law the decision is cited without disapproval or any comment. Such a suretyship may very well fall within the meaning of 'an idle promise': *vide* Mandlik's Hindu Law, 113. Brihaspati expressly mentions suretyship as not entailing any obligation on sons. In the view of most early Hindu moralists, suretyship was consistently disapproved. Grady's Hindu Law, 84, 85, where Gautama, 1 Dig, 305, is quoted with approval 'So debts originating in suretyship shall not involve sons.'

"On the other side are Mandlik's Hindu Law, p 103, quoting Katyayana, Strange's Hindu Law, p 301. In suretyship the son is always liable subject to assets and without interest where the undertaking was for payment—Manu Chap. 8, 160, 162; Yájnavalkya, 1 Dig, 247; Katyayana, 1 Dig., 248, 255.

"On principle I see no reason why a son should not be liable to pay his father's debt incurred as a surety. The criterion is not, I think, the advantage gained by the family, but the sin incurred by the parent should he not fulfil his promise. That sin in the eye of the moralist is not much affected by questions of consideration. A man may with perfect propriety stand surety for a friend, and he is as much morally bound to discharge his promise as he would be in law if it were supported by consideration."

Narayan V. Gokhale (*amicus curiæ*) appeared for the appellants (defendants Nos. 2—5):—He referred to Manu, Chap. VIII, pl. 159; Brihaspati, Chap. IX, pl. 40, 41 and 51; Gautama, Chap. II, pl. 41; Mandlik's Hindu Law, pp. 107, 108 and 206; Colebrooke's Hindu Law, Vol. I., pp. 164—176; Strange's Hindu Law, Vol. I, pp. 300, 301; *Moolchund* v. *Krishna*[1]; *Sitaramayya* v. *Venkatramanna*[2].

Vasudeo G. Bhandarkar (amicus curiæ) appeared for the respondent (original plaintiff):—In *Sitaramayya* v. *Venkatramanna*[2] the present point was not really in dispute. *Moolchund* v. *Krishna*[1] gives the old law as interpreted by the Shástris. See West and Bühler, p. 1239. The Mitákshara does not lay down that the son's liability is limited to a particular kind of surety-

(1) (1844) Bellasis Reports, 54. (2) (1888) 11 Mad., 373.

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ship of his father. The liability as a surety is not included among the debts which are classed as immoral or illegal. Both the Mitákshara and the Mayukha make no distinction in the nature of the debt for which the sons are held liable. The text of Brihaspati also states the rule generally, but Jagannath in his commentary makes the distinction—Colebrooke's Digest, p. 110. Gautama also gives the text generally without any restriction as to liability.

PARSONS, C. J. (ACTING):—The District Judge has referred the following point of Hindu law for the decision of this Court, *viz.*, whether ancestral property in the hands of sons is liable for a father's debt incurred as a surety. To that point we must add, to meet the facts of the case, the following words "for the repayment of grain lent," and we think that if the District Judge had noticed these facts, he would not have thought it necessary to make this reference, since upon it all the authorities agree and the conflict supposed to exist by the District Judge refers to a different kind of surety.

The general principle of English law, of course, is that the death of a surety does not affect his liability in respect of past transactions. Whatever liability had actually attached to the surety at the time of his death may be enforced against his representative.

Hindu law, however, recognizes four kinds of sureties: 1, for appearance; 2 for honesty; 3, for paying a sum lent; and 4 for delivery of the debtors' effects. In respect of the two former kinds, sons may not be responsible, but in the last two they are expressly declared to be liable. In the Laws of Manu (I quote this and succeeding authorities from Max Muller's Sacred Books of the East) at section 159 it is said that the son shall not be obliged to pay money due by a surety, but at section 160 it is explained that this rule applies to the case of a surety for appearance only: and that if a surety for payment shall die, the Judge may compel even his heirs to discharge the debt. Brihaspati in section 40 mentions the four classes of sureties and in section 41 says: "If the debtors fail in their engagements, the two first (the sureties themselves, but not their sons) must pay

the sum lent at the appointed time; both the two last (sureties), and in default of them their sons (are liable for the debt), when the debtors break their promise (to pay the debt)." Gautama, section 41, repeats Manu, section 159, but the note is to the effect that "Taking into account the parallel passages of Manu and Yájnavalkya, Haradatta very properly restricts this rule to a bail for the personal appearance of an offender." In Colebrooke's Hindu Law, Vol. 1, at page 164, the authorities on the subject of sureties will be found set out at length, and the liability of the sons in the case of suretyship for repayment of a debt is affirmed by Brihaspati (142), Yajnavalkya (144 and 152), (to which the note adds the Dipacalica and the author of the Mitákshara), Manu (151), Katyayana (153 and 158), Vyasa (157), and Smriti cited in the Mitákshara (159). The same authorities are quoted in Mandlik's Hindu Law at pages 107, 108 and 206.

There is also a judicial decision which affirms the son's liability. In *Moolchund* v. *Krishna*[1] the Court of Sadar Diváni Adálat concurred in the opinion of the Shástri to the effect that by Hindu law a son is always liable to fulfil the surety engagement of his deceased father to repay money as regards the amount of principal, and if a special agreement be made for interest, then he is also liable for interest.

We, therefore, answer the question in the affirmative.

RANADE, J. :—The question of Hindu law referred for the decision of this Court is "whether ancestral property in the hands of sons is liable for the debts of the father incurred by him as a surety." Both sides of the question were ably set before us in the learned arguments of Mr. Gokhale and Mr. Bhandarkar, and a careful consideration of the original texts and commentaries fully satisfies us that only one answer is possible to the question, and that answer must be in the affirmative.

The apparent conflict of authorities noticed by the District Judge in his observations in submitting this reference is obviously due to a misapprehension of the real nature of these texts and commentaries. They do not form, and were not intended to be

(1) (1844) Bellasis' Reports, 54.

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are gularly promulgated code of laws, every part of which has to be carefully correlated to other parts. They are rather of the nature of expositions of the theory of the law, and collections of recognized customs and approved usages. When any particular question has to be considered, the more general exposition has to be controlled by the maxims laid down in the particular chapter or chapters which specially treat of that matter, and the deficiencies of one text supplied by reference to other texts and authorities. For instance, when the texts speak of the weakness, incapacity, and dependence of Hindu women, the general expositions must be qualified by the particular positions laid down in respect of the widow's estate, or woman's power over her *stridhan*, or the daughter's or sister's right of succession, found in the same or other works specially devoted to these subjects. An express particular text occurring in its proper place limits mere general statements of the principles made in other places. This is a rule of interpretation which is often found necessary even in more regularly constituted codes of law, but it is specially obligatory in the interpretation of ancient Hindu law books. With this clue in hand, the doubts and conflict noticed by the District Judge are easily removed or reconciled. Mr. Mayne, para. 270, quotes apparently from Dayabhaga the general position that "sons are not compellable to pay sums due by their father for spirituous liquor, for losses at play, for promises made without consideration, or under the influence of lust or wrath, or *sums for which the father was a surety*, or for a fine or toll." This is, however, obviously a general exposition intended to set forth the limitations upon the son's liability to pay his father's debts. Occurring in the context where it stands, it simply suggests that surety obligations recklessly incurred stand in the same category with other extravagant or immoral acts of the father which entail no liability on the sons. These propositions occur in the chapter on the recovery of debts. It would not be safe, however, to infer from such texts occurring in such a place that the words above italicised are to be literally understood. They are controlled by the particular maxims laid down in the special chapter on surety obligations. The texts relating to this special subject are referred to by Mr. Mayne in the foot-note to the same para.

It is not necessary to set them out here at length. It will be sufficient to state that Brihaspati recognizes four different classes of sureties: (1) sureties for appearance, (2) sureties for honesty, (3) sureties for payment of money lent, (4) and sureties for delivery of goods. The obligation of the first two kinds of sureties is limited to themselves personally, and does not bind their sons; but the obligation incurred by the last two kinds of sureties binds them, and their sons also after their death The commentary of Ratnakar on this text expressly states that the sons shall be compelled to pay debts incurred by their father under the last two classes of surety obligations. The texts of Narad and Yajnavalkya recognize three classes of surety obligations only—those for appearance, those for honesty, and those for payment. Narad does not set forth the son's obligation in this place, but the Yajnavalkya text is quite as explicit as that of Brihaspati. The sureties of the first two classes must pay the debt, and not their sons, but the sons of the last kind of surety may be compelled to pay their father's debt incurred by him as surety. Katyayana refers to the same kind of surety when he lays down that the grandson of such a surety need on no account pay the debt, but the son must make it good without interest. The text of Vyasa makes the same distinction between the son and grandson's liabilities for such suretyship. Manu's texts on the subject clearly distinguish between sureties for appearance or good behaviour, and sureties for payment. The son shall not, according to Manu, in general be compelled to pay money due for suretyship, or idly promised to musicians and actresses, or lost at play, or due for spirituous liquors, or for tolls or fines. The general words "money due for suretyship" used in the text are expressly stated by the commentator Kulluka to refer only to sureties for appearance and good behaviour, but as regards a surety for payment, it is enjoined that the Judge may compel even his heirs to discharge the debt. Even as regards the first two classes of sureties, if they have derived any advantage, or received a pledge, their heirs may be compelled to pay the debt. The commentator Haradatta explains a similar text of Gautama by affirming the same distinction. This exposition of the authorities removes all apparent conflict, and the Pandits, whose advice was sought by the

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late Sadar Diváni Adálat in the case of *Moolchund* v. *Krinsha*[1], must have based their opinion on these same texts, though there is no express mention of the texts in the judgment. The more general texts which class suretyship obligation with reckless and immoral debts must, therefore, be qualified by the particular texts quoted above, and when so explained, it becomes clear that they refer to particular classes of sureties which do not include sureties for payment of debts, in respect of which last class, unless the debts can be shown to have been incurred for immoral or illegal purposes, the sons are liable to discharge their father's debts.

Order accordingly.

(1) (1841) Bellasis' Reports, 54.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), Mr. Justice Ranade and Mr. Justice Fulton.

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October 3.

A (WIFE), PETITIONER, *v.* B (HUSBAND), RESPONDENT.*

Divorce—Husband and wife—Indian Divorce Act (IV of 1869), *Secs.* 17 *and* 20*—Decree for nullity of marriage—Confirmation by the High Court—Time of confirmation—Practice—Procedure.*

Under the Indian Divorce Act (IV of 1869) a decree for nullity of marriage made by a District Court cannot be confirmed by the High Court before the expiration of six months from the pronouncing thereof.

REFERENCE by W. H. Crowe, District Judge of Poona, submitting decree for confirmation: see section 30 of the Indian Divorce Act (IV of 1869).

Suit for declaration of nullity of marriage on the ground of impotence.

The respondent did not defend the suit.

The Judge passed a decree for the petitioner, subject to confirmation by the High Court under section 20 of Act IV of 1869.

Lowndes, with *Marzban and Hemming*, appeared for the petitioner, and applied for immediate confirmation of the decree.

* Civil Reference, No. 7 of 1898.

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PARSONS, C. J. (ACTING) :—The point for decision is whether under the Indian Divorce Act, 1869, a decree for nullity of marriage made by a District Judge can be confirmed by a High Court before the expiration of six months from the pronouncing thereof.

Section 20 of the Act enacts "Every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court, and the provisions of section 17, clauses 1, 2, 3 and 4, shall *mutatis mutandis* apply to such decrees." It is thus necessary to determine what are the 1st, 2nd, 3rd and 4th clauses of section 17.

A reference to section 17 shows that it consists of 6 paragraphs and it was argued that each paragraph was a clause, and that, therefore, the proviso, which is paragraph 5, was the 5th clause. I cannot accept this argument. The 5th paragraph is not, in my opinion, a clause of the section. It is a proviso to the clause which precedes it, joined to it, as printed in the Government of India (Legislative Department) Edition (1887) of the Acts, by a colon, and must be considered to be a part and parcel of the foregoing clauses governing and controlling them and not forming itself a separate clause. At the time the Act was passed, it was not usually the practice in Acts of the Government of India to number clauses, but had these been numbered, I think there cannot be a doubt that this proviso would not have been numbered as a clause. I take as an illustration of this the Code of Criminal Procedure just passed, and will refer to sections 33, 35, 48, 57 and 123 only. Clauses 1, 2, 3 and 4 of section 17, therefore, must be held to include the proviso, and this being so, the Act expressly orders that no decree shall be confirmed under that section 17 till after the expiration of six months from the pronouncing thereof.

It was, however, further argued that decrees for nullity of marriage are confirmed not under that section, but under section 20. The application of clause 1 of section 17 to such decrees is, however, fatal to this argument. Section 20 itself provides for confirmation, so that there was no object in applying the provisions of clause 1 of section 17, which provide for the same

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confirmation, unless for the express purpose of enacting that the procedure for the confirmation of decrees for nullity passed by a District Judge shall be exactly the same as for the confirmation of his decrees for dissolution of marriage.

No doubt a difference is thus made between decrees for nullity passed by a High Court and those passed by a District Judge. The former are made absolute at once, the latter have to be confirmed by the High Court after a lapse of six months' time. No argument, however, can be based on this difference. Decrees for dissolution of marriage passed by a High Court are delayed in order to allow persons to intervene as provided by section 16, but there is no provision allowing of intervention in the case of decrees of nullity passed by a High Court. They may, therefore, be made absolute at once. In the case of decrees passed by a District Judge for dissolution, there is no provision made for any intervention, but yet they have to wait for six months before they can be confirmed. There is no reason, therefore, why decrees for nullity should not wait the same time.

The fact that at the time the Act was passed, decrees for nullity were made absolute at once under English law gives us no assistance. All we can say about this is that the Legislature adopted the English law in the case of decrees passed by a High Court and disregarded it in the case of decrees passed by a District Court, for which latter decrees a different procedure was expressly provided. For this reason we cannot under section 7 apply the law that since 1873 has been in force in England, under which the Courts there have a discretion to shorten the period of six months for which decrees of nullity have ordinarily to wait. (See 36 Vic., c. 31.)

We reject the application. It can be renewed when the six months' time has expired.

RANADE, J.:—This is a reference made by the District Judge of Poona, who submits for confirmation a decree passed by him on 16th August, 1898, declaring the marriage between the parties to the suit null and void.

The first question for consideration is whether, under the latter portion of section 20 of Act IV of 1869, which extends the provi-

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status of the children, as legitimate or bastard, may often be involved in the confirmation of such decrees more seriously even than in the case of decrees for the dissolution of marriage. There is equal room for collusion in both cases. The same safeguards are, therefore, needed in the one case as in the other. Then again section 7 of the Act directs that the principles and rules followed by English Divorce Courts shall govern, as far as may be, the Courts here in dispensing relief. The English enactments did not at first direct that decrees even in suits for dissolution of marriage should be made decrees *nisi*, but only allowed appeal within three months—(section 55 of 20 and 21 Vic. c. 85). Such appeal was allowed in cases of nullity decrees also by section 17 of 21 and 22 Vic., c. 108. Later on, section 7 of 23 and 24 Vic., c. 144, provided that every decree for divorce should in the first instance be a decree *nisi*, not to be made absolute till after three months had expired, and section 3 of 29 and 30 Vic., c. 32, extended this period to six months. In 1873 the same period was provided for in respect of nullity decrees. It is thus clear that both on grounds of strict construction and general reasoning, as well as analogy with the corresponding provisions of English law, the principles of which are obligatory on Courts in India under section 7, it must be held that clause 4 of section 17 with the proviso applies to nullity decrees sent up for confirmation under section 20, and that no order of confirmation can be passed till after six months have expired.

FULTON, J.:—I concur with the Acting Chief Justice in thinking that in section 17 of Act IV of 1869, the proviso governs and forms part of the 4th clause, and is, therefore, applicable to decrees for nullity of marriage under section 20.

Application rejected.

ORIGINAL CIVIL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Parsons.

IN THE MATTER OF DARASHA RUSTOMJI COLABAWALLA, PETITIONER. 1898. November 23.

University of Bombay—Act XXII of 1857, Sec. 12—Construction—Candidate for a degree.

The words "candidate for a degree" in section 12 of Act XXII of 1857 to establish the University of Bombay mean a candidate for the final examination, the passing of which entitles him to a degree. They do not mean a candidate for a degree at any stage of his University career. Students, therefore, presenting themselves for the Previous Examination prescribed by the Senate of the Bombay University need not present the certificate required by that section.

RULE *nisi* dated 2nd November, 1898, requiring the University of Bombay to show cause "why the abovenamed petitioner should not be allowed to sit at the Previous Examination to be held at Bombay on the 7th instant, and why the answer papers of the said petitioner should not be examined and the result declared, and also why, in the event of the said petitioner not being allowed to sit at the examination to be held on the 7th instant, the University should not be ordered to examine the said petitioner for the Previous Examination at any other early and convenient day, and to examine the papers of the said petitioner and to declare the result, &c."

The petitioner having presented his petition obtained the above rule under section 45 of the Specific Relief Act (I of 1877).

The following were the material facts stated in the petition:—

The University of Bombay was established under Act XXII of 1857. Under the powers conferred on it by the said Act, the University prescribed that before any candidate could present himself at any degree examination, he should have passed two preliminary examinations, *viz.*, the "Previous Examination" and the "Intermediate Examination;" and that candidates desiring to be examined at the "Previous Examination" must have passed the Matriculation Examination and kept two terms at a college or institution recognized in Arts (p. 42 of Calendar for 1897-98). With regard to candidates for degrees, it was further provided as follows by section 12 of the Act:—

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"12. Except by special order of the Senate, no person shall be admitted as a candidate for the degree of Bachelor of Arts, Master of Arts, Bachelor of Laws Licentiate of Medicine, Doctor of Medicine, or Master of Civil Engineering, unless he shall present to the said Chancellor, Vice-Chancellor and Fellows a certificate from one of the Institutions authorized in that behalf by the Governor of Bombay in Council to the effect that he has completed the course of instruction prescribed by the Chancellor, Vice Chancellor and Fellows of the said University, in the bye-laws to be made by them under the power in that behalf given by this Act."

The petitioner had duly passed the Matriculation Examination and had kept two terms at an Institution "recognized in arts" as required by the above-mentioned bye-laws of the University. This institution was known as the "Collegiate Institution", and by a resolution passed by the University Senate at a meeting held on the 20th February, 1897, it had been "recognized" for a period of three years for the purpose of the "Previous Examination" only. It did not, however, begin to receive and prepare intending candidates for the Previous Examination until December, 1897.

On the 17th December, 1897, the Registrar of the University by a letter of that date pointed out to the Principal (Mr. Karkaria) of the Collegiate Institution that the recognition of the Collegiate Institution was incomplete, and that to enable its members to proceed eventually to degrees, it would be necessary under section 12 of the Act that the Institution should be authorized by the Governor in Council to give certificates to candidates that they had completed the course of instruction prescribed by the University. The Principal replied that such authorization was not required for the Collegiate Institution, as that institution did not send up candidates for degrees, but only for the Previous Examination. The following is the correspondence which took place on this subject:—

"No. 1925 of 1897-98.

"*Bombay, 17th December*, 1897.

"To R. P. Karkaria, Esq., B.A.,
Bombay.

"Sir,—I am instructed by the Syndicate of the Bombay University to let you know that the recognition of the Collegiate Institution by the Bombay University is still incomplete.

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"2. I am to say that Government have pointed out to the Syndicate that under section 12 of the Act of Incorporation, an institution, in order to have such valid recognition as will entitle its members to eventually proceed to degrees, requires to be specifically authorized by His Excellency the Governor in Council to give certificates to candidates for degrees that they have completed the course of instruction prescribed by the University.

"3. Under these circumstances I am to suggest that before opening the institution you may think it advisable that the necessary authorization from Government should be obtained.

"I have, &c., &c.,
"(Signed) D. MACDONALD,
"University Registrar."

"*Bombay, 21st December*, 1897.

"TO DR. D MACDONALD,
"University Registrar.

"SIR,—In answer to your letter of the 17th instant, I regret to say that the alleged incompleteness in the recognition of the Collegiate Institution should have been brought to notice now ten months after the Senate has recognized it and when our arrangements for opening it have been quite completed.

"As regards the authorization from Government which is thought advisable by you to obtain from Government, I am advised that such an authorization is not necessary under the regulations for the recognition of institutions given on page 213 of the University Calendar. Regulation 3 says: 'It shall be competent for the Senate, on the recommendation of the Syndicate, to recognize an institution in any faculty for the purposes of a particular examination or examinations only.' And nothing is said here about Government authorization.

"Section 12 of the Act of Incorporation to which you refer, applies clearly and solely to institutions that send up candidates for a degree, whilst our institution has been recognized for the purposes of a particular examination—the Previous in Arts—only.

"That such is the case may be seen from the fact that institutions similar to ours have not obtained Government authorization, nor have they been advised by the Syndicate to apply for such authorization. Indeed, colleges teaching up to a degree have not obtained such authorization.

"Under these circumstances I do not see how I can apply to Government for authorization, as the Collegiate Institution is not to send up candidates for degrees, and as the regulations under which it has been recognized say nothing about its authorization.

"As our arrangements for opening the Collegiate Institution are quite complete, I shall be obliged by the favour of a very early reply to this letter.

"Yours truly,
"(Signed) R. P. KARKARIA,
"Principal."

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"No. 1949 of 1897-98.

"*Bombay, 23rd December*, 1897.

"To R. P. KARKARIA, Esq., B. A.,
"Bombay.

"SIR,—I have the honour by direction of the Syndicate to acknowledge receipt of your letter of the 21st instant and to state that after the warning given by them in my letter No. 1925 of the 17th instant the question of opening the Collegiate Institution is solely one for your consideration and that it would be at your own risk if you opened the institution without such authorization as is referred to in that letter.

"I have, &c. &c.
"(Signed) D. MACDONALD,
"University Registrar."

In February, 1898, Mr. Karkaria addressed the following letter to the University :—

"SIR,—With reference to the correspondence we had in the last week of December, 1897, I have the honour to enquire whether the Syndicate has done anything in the matter there alluded to, *viz.*, authorization of this institution by Government, as this college has been opened and lectures on all the subjects for the Previous Examination are being regularly given during the last five or six weeks to the students, who number more than 25. An early reply will oblige."

The following reply was sent by the University (No. 2330 of 1897-98, dated 16th February, 1898) :—

"SIR,—With reference to your letter of the 1st instant, I have the honour by direction of the Syndicate to state that in sending up to Government a list of the Colleges to which the authorization by Government under section 12 of the Act of Incorporation should in their opinion extend, they have omitted the name of the Collegiate Institution. They have further informed Government that as Principal of the Institution you were warned by them last December, before the institution was actually opened, that authorization by Government might be necessary to give full effect to 'recognition' by the Senate, and that, if you opened the institution before you had obtained such authorization, you would do so at your own risk."

In September, 1898, the petitioner through Mr. Karkaria, the Principal of the "Collegiate Institution," applied to the University to be permitted to appear at the Previous Examination to be held on the 7th November following, and forwarded the certificates and fees required by the Regulations.

Thereupon the Registrar of the University sent the following letter refusing the required permission :—

"No. 2174 of 1898-99.

"*Bombay, 7th October*, 1898.

"TO THE PRINCIPAL, COLLEGIATE INSTITUTION,

"Bombay.

"SIR,—With reference to the applications for permission to appear at the ensuing Previous Examination received from you on 22nd September last, I have the honour by direction of the Syndicate to inform you that the candidates cannot be admitted to the examination. The candidates' fees will be returned to you in a few days.

"I have, &c., &c.

"(Signed) D. MACDONALD,

"University Registrar."

The petitioner then presented a petition to the High Court under section 45 of the Specific Relief Act (I of 1877) and obtained the above rule. The question was whether, as the Collegiate Institution was not authorized by Government as required by section 12 of the Act, the petitioner could claim to be examined at the Previous Examination. The petitioner contended that section 12 only applied to a person presenting himself for the final B.A. Examination; that such a person only could be considered as a "candidate for a degree" within the meaning of that section, and that he only could be called upon to give the certificate thereby required. The University on the other hand contended that the petitioner as a student who had matriculated and desired to pass the Previous Examination must be considered as a "candidate for a degree" within section 12 and must present the certificate thereby required.

The prayer of the petition was as follows:—

(1) That the University of Bombay do allow your petitioner to sit at the Previous Examination to be held on the 7th instant.

(2) That the University do examine his answer papers and declare the result.

(3) That, in the event of the University being not ordered to allow your petitioner to sit at the examination on the 7th instant, the University do examine him for the Previous Examination at any other early and convenient date and declare the result.

(4) That, in the event of your petitioner failing to pass the examination this year, the University do examine him once in every subsequent year for the Previous Examination and declare the result till he passes the said examination.

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"24. That your petitioner prays that this Honourable Court may pass such other and further orders as the circumstances of the case may require."

Scott, for the University, showed cause.

Macpherson and *C. H. Setalvad*, *contra*, in support of the rule.

The Act of Incorporation (Act XXII of 1857), sections 8 and 12, and the bye-laws of the University (see University Calendar for 1897-98) were referred to.

KEMP, C. J.:—There can be no doubt that this is a very important case, affecting as it does the course of studies of the students of the University of Bombay. I think I speak for my learned brother when I say that we have no doubt what our judgment should be in this case. I understand the course of proceeding which we are asked to adopt is analagous to that which the Court of Queen's Bench in England has been accustomed to take when applied to for a writ of mandamus. The Court of Appeal has been asked to compel the Bombay University, a Corporate Body, to carry out a duty imposed upon it by statute. And the Act, which corresponds in its procedure to the application for a writ of mandamus in England, is the Specific Relief Act of 1877, and under section 45, chapter 8, of that Act it is laid down (His Lordship read the section and continued).

The facts are shortly these. The applicant to this Court was a student who was desirous of being examined at an examination, called the Previous Examination, which is one of the examinations that a student at the Bombay University must pass on his way to a degree. It is clear to me that he came under section 12 of the Act of Incorporation of the University, and that he had a right to demand that he should sit and be examined at this examination. But it was said that before having the right to be so examined he must first produce a certificate to the effect that he had previously studied in one of the institutions recognized by the University Governing body and authorized by the Governor in Council. I need not go into the facts of that part of the case, but need only say that it was admitted that he was not provided with such certificate, and he was, therefore, rejected by the University, who refused to allow him to sit and be examined at a "Previous Examination." A way out of the dead-lock was,

however, found that was praiseworthy, since he was allowed to be examined *de bene esse* pending the decision of this Court as to whether under the circumstances he had the absolute right to demand to be so examined or not.

Looking at section 12 I think the first thing we have to ask ourselves is whether the applicant came under the designation of "Candidate for a degree of B A.," and it seems to us that having regard to the end of the section it can only be read as applying to those persons, and to those persons only, who asked to be examined for the third or final examination for the B.A. degree. (His Lordship then read section 12 of Act XXII of 1857 and continued :—) Certificates as to the previous course of instruction are by the concluding words of the section to be demanded from and produced by those who have completed their course. The applicant in this case had come forward to be examined for the Previous Examination and could not be said in any sense to have "completed his course of instruction." He had only recently passed his Matriculation Examination and was approaching, as I have said, his Previous Examination, which was that which was only second on the list on his way to a degree. Therefore, it would be impossible for him to give any such certificate as would be required by the Act, and it seems to me that the by-laws which were afterwards appended to the Act help us to that decision. On page 42 under the heading of B.A. are specified the various examinations a student has to go through on his way to a B.A. degree, and clause 9 says that "Candidates for the Degree of B A." must have passed their Matriculation and will be required to pass three subsequent examinations to obtain such a degree. Regulation 11 may apply to this case, and he might be told on his entrance as a student of the University that he would be required to pass the "Previous," the "Intermediate" and the "Third or Final Examination for the Degree of B.A."

I do not agree with the arguments of Mr. Macpherson with regard to the whole of the examinations having to be passed before the student becomes a "candidate for the Degree of B.A." I agree with the interpretation of my learned brother. When a candidate appears for an examination which it is necessary for him to pass immediately prior to, and which is expressly

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called the Final Examination for, the Degree of B.A., it seems to me that the words of section 12 apply to him; that he then becomes a candidate for the degree of B.A., and that he must produce before being allowed to take his B.A. degree a certificate showing he has received instruction at an "authorized" institution.

These, shortly, are the reasons which induce this Court to come to the conclusion that the University in this matter have struck too soon. We cannot find any authority that provides that he must produce these certificates at an earlier or at every preliminary examination. Section 12 means what it says. At the final examination the University should ask for the certificate to the effect that he has been introduced by a recognized institution. Those are the grounds upon which I base my decision, and I think they are the same upon which my learned brother will give judgment.

PARSONS, J.:—The first point for our decision in this case is the meaning of the words "candidate for the degree" used in section 12 of Act XXII of 1857. Do they mean a candidate for a degree at any stage of his University career, or do they mean one who is a candidate for the final examination, the passing of which would entitle him to the degree? I think the latter. In section 8 of the Act the expression "candidates for degrees" apparently means all persons who make use of the University with the object of obtaining a degree. It allows of the making of bye-laws and regulations touching the qualifications of the "candidates for degrees" and the previous course of instruction to be followed by them and the preliminary examinations to be submitted to by them. At the same time it shows clearly that there is intended to be only one examination for degrees which it calls "the examination for degrees." The holding of this examination is provided for by section 13, which enacts that an examination for degrees shall be held at least once in every year, and that the candidates shall be examined at every such examination. Before this section comes section 12, which provides that "no person shall be admitted as a candidate for the degree . . . unless he shall present . . . . a certificate . . . . to the effect that he has completed the course of instruction pre-

scribed . . in the bye-laws." The use of the word "admitted" might mean that he shall not be admitted at all to the University. This, however, is negatived by the use of the words "completed the course of instruction," and it was not a construction that was contended for on behalf of the University. Their counsel only argued that the words meant that he should not be admitted to any examination which was prescribed for the degree. But to this argument also the use of the same words seems to be equally fatal. To suit this argument we should have to read the section as providing that no person shall be admitted as a candidate for any examination, preliminary or final, prescribed for the degree without a certificate that he has completed the course of instruction prescribed down to the stage at which he has arrived, or for the examination at which he is about to present himself. This would, I think, be doing great violence to the words of the section as they stand. In my opinion, the course of instruction and the preliminary examinations, which are provided for by bye-laws, come within the words "course of instruction," and section 12 enacts that no one shall be admitted to the examination for degrees without a certificate that he has conformed to the bye-laws and completed the prescribed course of instruction. All other matters the Legislature has left the University to arrange, but this certificate (and one only is mentioned) is to be given by an institution authorized in that behalf by the Governor of Bombay in Council. I am confirmed in this opinion by the order in which the sections are placed. Section 11 gives the power to confer degrees after examination (that is, after the final examination). Section 12 deals with the qualifications of candidates for degrees (that is, for that final examination for degrees). Section 13 provides for the holding of that final examination for degrees and section 14 for the grant of degrees at the conclusion of the examination to those deemed entitled to them. All these sections deal in order with the same examination which can only be a final examination, the one which qualifies for a degree directly and immediately.

This, then, being my opinion on the meaning of section 12, it follows that a certificate is not required by that section or by any other provision of law for the Previous Examination, which is

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a preliminary one made by bye-laws under section 8 of the Act. We need not, therefore, enter on the other points raised. The applicant is duly qualified and has satisfied the requirements of the bye-laws of the University as to his appearance at the Previous Examination, and the University were under statutory obligation to examine him when he presented himself for it. We, therefore, make the rule absolute with costs.

Rule absolute.

Attorneys for the Petitioner :—Messrs. *Thakoredas, Dharamsi and Cama.*

Attorneys for the University :—Messrs. *Craigie, Lynch and Owen.*

INSOLVENCY JURISDICTION.

Before Mr. Justice Russell.

1898. December 21.

DAYABHAI SARUPCHAND, INSOLVENT; SORABJI BYRAMJI COLAH, OPPOSING CREDITOR.

Insolvency—Order of personal discharge—Finality of order—Indian Insolvent Act (Stat. 11 and 12 Vict., cap. 21), Ss. 47, 56—Practice—Procedure.

An order under section 47 of the Indian Insolvent Act (Stat. 11 and 12 Vict., cap. 21) for the final discharge of an insolvent once granted cannot be set aside except upon the grounds specified in section 56 of that Act. The only course open to an opposing creditor is to appeal against the order under section 73.

RULE obtained by the opposing creditor to have an order made under section 47 of the Indian Insolvent Act (Stat. 11 and 12 Vict., cap. 21), for the personal discharge of the insolvent revoked or set aside.

The insolvent had filed his petition and schedule on 12th January, 1898. In pursuance of Rule 14 (see Rules and Orders, Bombay) he gave notice of his intention to apply to the Court for an *interim* order of protection under section 13 of the Insolvent Act. Thereupon the opposing creditor filed grounds of opposition to such order, and appeared by counsel on the 4th May, 1898, to oppose the granting of the order. The Court, however, in spite of his opposition granted a protection order to the in-

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solvent for three months. On the 3rd August, 1898, the insolvent applied for an extension of the *interim* order, which, notwithstanding the opposition of the opposing creditor, was granted for a further period of two months.

In September, 1898, the insolvent served notices (under Rule 12) upon his creditors, and the 5th October, 1898, was appointed for the hearing of his petition. In the notices the creditors were called upon to file their grounds of opposition (if any) three clear days before the day so fixed for the hearing of the petition. (See Rule 18.)

On the 5th October, 1898, the case came on for the first hearing, and on that day, according to the practice, the insolvent obtained a rule *nisi* for his personal discharge under section 47 of the Insolvent Act, which was made returnable a fortnight later, *viz.*, on the 19th October. At the same time (*viz.*, 5th October) he obtained a further extension of his *interim* protection order for one month.

On the 19th October, 1898, the case came on again, and there being no opposition, and no grounds of opposition having been filed under Rule 18, the insolvent obtained his personal discharge under section 47 of the Act.

On the 16th November, 1898, the opposing creditor took out a rule calling upon the insolvent to show cause "why the matter of his petition should not be re-heard or reviewed, or why the order made in the matter on the 19th October, 1898 (whereby it was (*inter alia*) ordered that the said insolvent should be declared entitled to the benefit of the Act passed for the benefit of insolvent debtors in India) should not be revoked or set aside."

In the affidavit filed in support of the rule, the opposing creditor stated that he was in Court on the 5th October, 1898, when the insolvent's case was called on, but that, hearing that an extension of the protection order was granted for one month, he "left the Court under the impression that the hearing of the insolvent's petition would take place a month thereafter." The affidavit then proceeded as follows:—

"8. On reading the newspapers on the 20th instant, I was exceedingly surprised to learn that on the 19th instant the petition of the insolvent was heard and that he was discharged.

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"9. I say that I intended to oppose the discharge of the insolvent and that it is my intention to do so if I am permitted.

"10. I filed my grounds of opposition to the discharge of the insolvent and my affidavit of claim so far back as the 3rd day of May, 1898, and I was informed that by reason of my having filed such grounds of opposition the petition of the insolvent was liable to be placed in the opposed list and, therefore, was not likely to be called on for hearing for some months, and such my belief was strengthened when on the 5th day of October, 1898, I attended the Court, the insolvent himself applied for an extension of the protection order, although, according to the terms of the notice served upon me, that day, *viz.*, the 5th day of October, 1898, was fixed by the Court for the hearing of the insolvent's petition.

"11. I, therefore, pray that the order for the discharge of the said insolvent may be annulled, and that his petition may be again set down for hearing, and that I may be permitted to oppose his discharge."

The rule now came on for hearing.

Mankar, for the insolvent, showed cause:—The order of discharge once made cannot be set aside, unless upon some of the grounds mentioned in section 56 of the Act. None of these grounds are shown in the opposing creditor's affidavit. The Court has, therefore, no power to re-hear the matter. There has been no fraud or misconduct of any kind on the part of the insolvent in obtaining his discharge, nor is it alleged. The failure of the opposing creditor to appear on the day of hearing through accident or mistake is not sufficient cause under the section to justify the Court in reviewing its order—*In re Golam Hoosen* decided by Bayley, J., on 10th February, 1892 (not reported); *In re Jacob Auron* decided by Farran, J., on 16th January, 1895 (not reported); and *In re Shalom Balkoji Tayaokar* decided by Strachey, J., on 18th November, 1896.

Inverarity for the opposing creditor in support of the rule:—I don't apply for a review under section 56. That section does not refer to a case like this. We ask to have the order of discharge set aside. The Court has power over its own order independently of that section. The order was passed under circumstances which make it an injustice to the opposing creditor. He was misled by what took place in Court on the 5th October and understood that the matter would not come on again for a month. It is only reasonable that the Court should set aside the order of discharge.

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RUSSELL, J.:—The facts of this case I find from the records are as follows:—The insolvent filed his petition on the 12th January, 1898. He obtained an *interim* order on the 4th May, 1898, for three months notwithstanding that notice and grounds of opposition to the *interim* order were filed by the abovenamed opposing creditor on the 3rd May, 1898, and gone into. On the 3rd August, 1898, the said *interim* order was extended for two months, although the said opposing creditor again appeared and opposed.

Notices for discharge were issued by the insolvent and duly served upon the opposing creditor, among other creditors, on the 15th August, 1898, fixing the 5th October, 1898, for the first hearing. Such notices contain the usual clause:—"If you wish to oppose the discharge of the said insolvent, you must give notice thereof to me, *i. e.*, the Clerk of the Court, in accordance with Rule 18." As no such notice was ever received from any of his sixty-nine creditors, the insolvent on the 5th October, 1898, obtained his usual rule *nisi*, and on the 19th October, 1898, he obtained his personal discharge under section 47 in the ordinary course unopposed.

The opposing creditor took out a rule calling upon the insolvent to show cause why the order for his discharge should not be set aside, to which Mr. Mankar showed cause on the 21st instant, and the matter was argued by him and Mr. Inverarity before me. I am of opinion that the rule must be discharged upon the ground that I have no power to set aside the order for discharge. Section 56 of the Insolvent Act provides as follows:—(His Lordship read the section and continued.) It has been argued before me that the word "review" there does not include setting aside an order. I am of opinion that this argument is not well founded. The section distinctly provides for the finality of orders of discharge, and I apprehend that the word "review" means "take again into consideration with a view of further dealing with the order." It seems to me that it is only when the Court can take into consideration the order with the view of further dealing with it upon the grounds mentioned in the section, that the Court can rehear the matter and then annul the original order. The circumstances of this case do not bring it within the purview of

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section 56 and consequently the only course open to the opposing creditor is to appeal under section 73 from the order granting the discharge. See *Re Blackwell* [1].

I would add that I have referred to two other cases: one *In re Jacob Aaron* [2], where an application was made to set aside an order of discharge upon the ground that it had been granted owing to the Insolvent Court sitting unexpectedly, and the opposing creditor consequently not appearing. That application was refused. A similar application was made in No. 376 of 1895 in which the order of discharge had been granted in consequence of the opposing creditor's counsel being accidentally not present in Court. That application was also refused. The present case is stronger, because the opposing creditor took no notice of the express notice given to him by the Clerk of the Insolvent Court in accordance with the practice in that behalf. Having regard to that practice I do not think the mere filing of the grounds of opposition is a sufficient compliance with Rule 18. I cannot but regret this result, and discharge the rule without costs, which was the course adopted in the cases I have referred to.

(1) (1872) 9 Bom. H. C. Rep., 319. (2) No. 117 of 1891, unreported.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

1898. *October* 3.

KUSAJI (ORIGINAL APPLICANT), APPELLANT, *v.* VINAYAK R. PARABHU (ORIGINAL OPPONENT), RESPONDENT.*

Surety—Limitation Act (XV of 1877), Sch. II, Art. 179, Expl. 1—Liability of surety in execution—Application for execution against a surety when a step in aid of execution against a principal—Mode of enforcing payment against a surety—Practice—Procedure.

Vinayak Ramchandra was awarded the sum of Rs. 4,951-13-11 by the District Judge as compensation for land taken up by the Collector under the Land Acquisition Act, 1870. The money was ordered to be paid over to him on his giving security for its refund in case the appellate Court so ordered. Damodar Viziarangam thereupon became his surety and executed a bond binding himself to pay into Court the said sum of Rs. 4,951-13-11, if ordered by the Court. On the

* Appeal, No. 45 of 1898.

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25th September, 1893, the High Court varied the order of the District Court and awarded Rs. 4,204-7-11 (part of the Rs. 4,951-13-11) to another claimant Kusaji Ramji (the appellant). On 17th February, 1894, Kusaji applied for execution of this order against the surety Damodar and claimed also interest (Rs. 1,635-10-0) and costs (Rs. 550-15-4) Damodar objected to pay interest or costs, and the High Court held that, as surety, he was liable only for the principal sum, but not to interest or costs. Subsequently, *viz.*, on the 16th February, 1897, Kusaji applied for execution against the principal debtor Vinayak of the order of the 25th September, 1893, in respect of the interest and costs, contending that his application of the 17th February, 1894, against the surety was a step in aid of the execution of the order under article 179 of the Limitation Act (XV of 1877) and prevented limitation.

Held, that his application was barred by limitation. The application for execution against the surety would not operate to keep alive the order as against the principal debtor unless it was made to enforce a liability which was common to both under the order. But under the order the surety was not liable for interest or costs. His liability was expressly confined by his bond to the principal sum, and it was only as to that sum that he was jointly liable with Vinayak. The previous application, therefore, for execution against the surety for money for which he was not liable under the order, could not be regarded as a step in aid of execution against the principal debtor Vinayak.

The mode of enforcing payment against a surety is by summary process in execution and not by separate suit.

APPEAL against the order of W. H. Crowe, District Judge of Poona, in a miscellaneous proceeding.

The Collector of Poona having acquired certain land under the Land Acquisition Act (X of 1870), it was decided that Rs. 4,951-13-11 should be paid as compensation to the owners. Several persons claiming this money, the Assistant Collector referred the adjudication of their claims to the District Judge The Judge decided that the entire sum should be paid to Vinayak Ramchandra (the respondent), but ordered that the money should not be handed over to him until the expiration of the period allowed for an appeal, or till further order, unless he (Vinayak) gave security that he would refund it if ordered.

Accordingly one Damodar Viziarangam Mudliar stood surety for Vinayak, and passed a bond, binding himself, in case of Vinayak's default, to pay into Court the sum of Rs. 4,951-13-11. The material part of the surety bond was as follows:—

"In default, I, Damodar Viziarangam, will, when the Court shall order, repay into Court Rs. 4,951-13-11."

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Upon the execution of this bond, the whole sum was paid over to Vinayak.

The other claimants, however, appealed, and in appeal the High Court on the 25th September, 1893, varied the order of the District Judge by awarding the sum of Rs. 4,951-13-11 in different shares to three of the claimants, *viz.*, Kusaji Ramji (the present appellant) and two other persons. The share awarded to Kusaji (the appellant) was Rs. 4,204-7-11. The order was silent as to interest on this sum, but directed that Vinayak should pay Kusaji's costs.

On the 17th February, 1894, Kusaji applied to the District Court for the attachment and sale of the moveable property of the surety Damodar for the purpose of realizing his share (Rs. 4,204-7-11) together with Rs. 1,605-10-0 interest and Rs. 550-15-4 costs. Damodar objected that he was not liable to the interest or costs. The Judge held that he was liable for both. On appeal, however, the High Court on the 15th July, 1895, reversed this order and held that, as surety, Damodar was liable only for the principal sum and not for interest or costs[1].

Kusaji then proposed to recover the interest and costs from the principal debtor Vinayak, and accordingly on the 16th February, 1897, he applied that the original order of 25th September, 1893, against Vinayak (the opponent) should be transferred under section 223 of the Civil Procedure Code (Act XIV of 1882) to the Court of Small Causes at Bombay for execution, stating that Vinayak was a resident of Bombay and claiming the said interest and costs from him in execution of the order. Vinayak (the opponent) contended that this application for execution of the order of 25th September, 1893, was barred by limitation.

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(1) In that case Farran, C. J., gave judgment as follows:—

It must be conceded that Vinayak Ramchandra could rightly be ordered to repay the amount paid to him with interest. The question, however, is whether the surety can be ordered to repay more than the principal sum. The material part of the bond, which was passed by the surety, is as follows:—"In default I, Damodar Viziarangam, will, when the Court shall order, repay into Court Rs. 4,951-13-11." Section 128 of the Contract Act provides that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. We think here that the extent of the obligation of the surety is limited by the express terms of the bond to the precise amount which the surety has in it undertaken to repay. (See Printed Judgments for 1895, page 227.)

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The question was whether the application for execution against the surety (Damodar) on 17th February, 1894, prevented limitation against the principal debtor (Vinayak).

The Judge held that the present application was barred by limitation, on the ground that the proceedings against the surety should have been by way of a separate suit and not in execution, that the application of the 17th February, 1894, was, therefore, not in accordance with law, and did not prevent limitation (see article 179 of Limitation Act). In his judgment he said:—

"It is admitted that applicant did apply by application, dated 17th February, 1894, to recover from a surety a certain sum awarded by the decree of the High Court, dated 25th September, 1893. That surety had not under section 253, Civil Procedure Code, become liable prior to the passing of the decree, but under section 546 while the appeal was pending. His liabilities, therefore, could not be enforced in execution of the decree but by separate suit. The various High Courts appear to have held different views with respect to the procedure to enforce a security bond prior to Act VII of 1888, which made express provision with regard to matters coming under sections 549 and 610 of the Civil Procedure Code, but said nothing as to sections 545 and 546. The ruling in *Subjoo* v. *Balmakund*[1] appears to me in point, and by the light of that judgment I cannot hold that the application to enforce a security bond was an application for execution, or to take some step in aid of execution."

Kusaji then appealed to the High Court.

Vinayak S. Bhandarkar, for the appellant (Kusaji):—Our application of 16th February, 1897, seeks execution against Vinayak of the order of the 25th September, 1893. The application against his surety Damodar on the 17th February, 1894, prevents limitation (article 179, clause 4). That application was a step in aid of execution and was the proper remedy against a surety —*Venkapa* v. *Baslingapa*[2]; *Ex parte Bhikaji*[3]. The liability of the surety and the principal debtor is co-extensive and joint, and the application for execution against one of two persons jointly liable keeps alive a decree against the other—*Janki Kuar* v. *Sarup Rani*[4]; *Thirumalai* v. *Ramayyar*[5].

Trimbak R. Kotwal, for respondent (opponent):—This application for execution is in respect of interest and costs. The order

(1) (1895) 23 Cal., 212.
(2) (1887) 12 Bom., 411.
(3) (1867) 4 Bom. H. C. Rep., 119 (A. C. J.)
(4) (1895) 17 All, 99.
(5) (1889) 13 Mad., 1.

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of 25th September, 1893, does not give interest. The applicant cannot, therefore, recover it in execution—*Pandurinath* v. *Lilachand* [1]. The application of 17th February, 1894, was not a step in aid of execution, inasmuch as it sought to obtain what was not granted in the order—*Ramchandra* v. *Kondaji* [2]; *Daya Kishan* v. *Nanki Begam* [3]; *Krishnaji* v. *Anandrav* [4].

The liability created by the order was joint so far as the principal sum was concerned, but not as to interest and costs; for while Vinayak as principal debtor was liable to both, the surety was liable to neither. The present application against Vinayak being more than three years after the date of the order is, therefore, barred by limitation, as the application against Damodar, a surety, does not keep alive the order against Vinayak, the principal.

PARSONS, C. J. (ACTING):—The facts are these: Compensation was awarded to the respondent under the Land Acquisition Act. The appellant, who had made a counter-claim to the compensation, appealed to the High Court. The respondent, when paid the money, gave security for its refund if the appellate Court so ordered. The High Court decided the appeal in the appellant's favour on the 25th September, 1893. The appellant applied in execution on the 17th February, 1894, against the surety alone for the recovery of the principal amount paid with interest on the same and the costs of the litigation. He recovered the principal amount only, as the High Court held that the surety was liable for the amount named in his surety bond only, and not for any interest or for costs: see *Damodar* v. *Kusaji* [5]. He filed his present application on the 16th February, 1897, to have the decree transferred to Bombay, in order to execute it against the respondent to recover from him the said interest and costs.

The District Judge held that the application to execute the decree against the respondent was time-barred, since the application against the surety was not made in accordance with law, citing *Subjoo Das* v. *Balmakund Das* [6]. This High Court, however, has decided that the mode of enforcing payment by a

(1) (1888) 13 Bom., 237.
(2) (1896) 22 Bom., 221 at p. 224.
(3) (1898) 20 All., 394.
(4) (1883) 7 Bom., 293.
(5) P. J., 1895, p. 227.
(6) (1895) 23 Cal., 212.

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surety is by summary process in execution, and not by means of a separate suit—*Venkapa Naik* v. *Baslingapa*[1]; and the District Judge ought to have followed that decision of this Court, rather than that of another High Court.

Treating, then, the application against the surety of the 17th February, 1894, as a step properly taken in execution against him, and assuming that he is to be treated as a party to the suit bound by the decree in so far as he was a surety for its due performance, we have to see if the application is one that takes effect against the respondent. The answer to this question depends upon whether the liability under the decree was joint or separate, and as to this there can be no doubt. The surety was not liable either for interest or for costs. His liability was expressly confined by his bond to the principal sum of Rs. 4,951-13-11, which was paid to the respondent, and as to that sum only can there be said to be any joint liability under the combined effect of the decree and the surety bond. For the interest and costs there was but one person made liable under the decree, *viz.*, the respondent.

The case, therefore, is one in which the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, and according to Explanation 1 to article 179 of the Limitation Act, the application takes effect against only such of the said persons as it may be made against. The application of the 17th February, 1894, therefore, does not take effect against the respondent, and the present application to execute the decree is time-barred. For this reason we dismiss the appeal with costs.

RANADE, J.:—I concur. The authorities, cited on behalf of the appellant, only go to show that, where a decree imposes a joint liability upon several persons, execution taken out against any one of them is a step in aid of execution against the rest. In the present case, however, there is admittedly no joint liability in respect of the sum due for interest and costs, which the decree-holder now seeks to recover from his principal judgment-debtor. The surety was not liable for these sums under his bond, and it

(1) (1887) 12 Bom., 411.

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is thus obvious that the previous execution of the decree against the surety cannot be regarded as a step in aid of execution against the principal in respect of the sums now claimed. The District Judge, therefore, very properly held that the execution was time-barred under these circumstances.

Appeal dismissed.

CRIMINAL REVISION.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

1898. October 3.

IN RE BULAKIDAS.*

Maintenance—Husband and wife—Maintenance order obtained by a wife against husband—Subsequent decree for restitution of conjugal rights obtained by husband—Effect of such decree on previous order of maintenance—Criminal Procedure Code (Act X of 1882), Sec. 488.

A decree of a civil Court for restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance, if the wife should persist in refusing to live with her husband. A Magistrate ought to cancel a previous order of maintenance made by him, or rather treat it as determined, if the wife failing to comply with the decree for restitution refuses to live with her husband.

APPLICATION under section 435 of the Code of Criminal Procedure (Act X of 1882).

On 22nd May, 1891, Bai Ganga obtained an order for maintenance against her husband Bulakidas under section 488 of the Criminal Procedure Code (Act X of 1882) in the Court of the First Class Magistrate of Ahmedabad.

On the 1st February, 1892, Bulakidas sued Bai Ganga in the Court of the First Class Subordinate Judge of Ahmedabad, and obtained a decree for restitution of conjugal rights.

On 19th September, 1893, Bai Ganga applied to the Magistrate to enforce the order for maintenance and to recover twenty months' arrears of maintenance. Thereupon the arrears were paid into Court by Bulakidas.

On the 25th September, 1893, Bulakidas applied to the Magistrate for a refund of the money so paid into Court, alleging that his wife had returned to his house in obedience to the decree for

* Application for Revision; No. 189 of 1898.

restitution of conjugal rights which he had obtained, and contending that she was, therefore, not entitled to recover the arrears of maintenance claimed by her. This allegation was held by the Magistrate to be not proved, and the application was rejected on 8th February, 1894.

In 1895, Bai Ganga filed a suit in the Agency Court at Rájkot for arrears of maintenance. This suit was ultimately dismissed on the ground that she had lost her right of maintenance by her own conduct, and that the Magistrate's order for maintenance could no longer be enforced.

Thereupon Bulakidas made the present application to the First Class Magistrate of Ahmedabad to cancel the order of maintenance passed in 1891.

The chief grounds upon which he made this application were :

(1) That he had obtained a decree in the Civil Court in 1892 for restitution of conjugal rights, and

(2) That after this decree his wife had returned to his house and lived with him for ten or twelve days, and that she had then left his house. This conduct (it was urged) disentitled her to any maintenance allowance.

The Magistrate held that both these objections had been raised before his predecessor in 1891, and had been overruled, and that he was, therefore, precluded from re-hearing them as decided by the Allahabad High Court in *Laraili* v. *Ram Dial*[1]. He was further of opinion that as the applicant had not executed the decree for restitution of conjugal rights, he was not entitled to the relief he claimed. He, therefore, dismissed the application.

Against this order of dismissal, Bulakidas applied to the High Court under its criminal and revisional jurisdiction.

Goverdhan M. Tripati for applicant.

Ganpat S. Rao for opponent.

PARSONS, C. J. (Acting) :—The authorities show that an order of a civil Court restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance, if the wife should persist in refusing to live with her husband—*Lutpolee Doomony*

(1) (1882) 5 All., 224.

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v. *Tikha Moodoi*[1], and that a Magistrate ought to cancel his order, or rather to treat it as determined, if the wife failing to comply with the decree for restitution refuses to live with her husband —*In re Kalidas Mansukram*[2].

The Magistrate in this case has not found whether or not the opponent persists in refusing to live with the applicant. All he says is that the applicant has not executed the decree which he obtained for restitution of conjugal rights or sought to obtain possession of his wife. This is beside the case. The Magistrate must find whether the wife has obeyed the decree; if she has not, then she would not be entitled to a maintenance order.

We reverse the order of the Magistrate and remand the case for a rehearing.

(2) (1870) 13 Cal. W. R., 52 Cr. Rulings. (3) Criminal Revision, No. 139 of 1878.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

1898. October 5.

DADA BHAU KITTUR (ORIGINAL PLAINTIFF), APPELLANT, *v.* NAGESH RAMCHANDRA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS *

Valuation—Court Fees Act (VII of 1870), Sec. 7, Cl. 10 (a), Cl. 4 (c), (d); Sec. 12—Class to which a suit belongs—Decision as to such class—Appeal—Practice.

An appeal lies against a decision as to the class to which a suit belongs although it does not lie against a decision as to the valuation of the suit in that class. A decision of the lower Court, holding that a suit is one for specific performance of a contract of sale and to be valued according to the amount of the consideration-money, is appealable.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum, confirming an order passed by Ráo Bahádur G. V. Limaye, First Class Subordinate Judge.

The plaintiff brought this suit praying for a declaration that a certain purchase made in the name of the first defendant was a benámi transaction for him (the plaintiff) and for an order that the defendants should execute a conveyance of the property to him. The consideration money for the purchase was Rs. 1,265, The Subordinate Judge held that the suit was one for specific

* Second Appeal, No. 227 of 1898.

performance and fell under clause x (*a*) of section 7 of the Court Fees Act (VII of 1870) and that the plaint should be stamped according to the amount of consideration (Rs. 1,265), and he dismissed the suit, as the plaintiff failed to pay this amount.

The plaintiff appealed, contending that the suit was not one for specific performance and did not fall under clause x (*a*) of section 7, but within clause iv, sub-section (*c*) or (*d*), and had, therefore, been wrongly dismissed.

The Judge in appeal held, however, that the question was one of valuation, and that under section 12 of the Court Fees Act (VII of 1870) the decision of the lower Court was final, and he dismissed the appeal. He said:—

"The Judge below decided that the valuation was incorrect, and the terms of his order bring the case under section 12 of the Court Fees Act (VII of 1870). That section gives finality to the decision of the Judge below, and I must, therefore, dismiss this appeal, though I do not agree with the principle on which the learned Judge apparently valued the claim."

The plaintiff preferred a second appeal.

Sadashiv R. Bakhle appeared for the appellant (plaintiff):—The lower appeal Court dismissed the plaintiff's appeal, holding that the question was one of valuation and fell within section 12 of the Court Fees Act (VII of 1870), which makes the lower Court's decision final. But the case does not fall under section 12. The question here is not a question "relating to valuation" within the meaning of that section. The question is as to the clause under which valuation is to be made. It has been held that the question as to the application of a particular section is distinct from the question of making the valuation after determining the section. It is only in the latter case that section 12 of the Court Fees Act makes the decision final: see *Abaji Parashram* v. *Ramchandra Bhimaji*[1]; *Vithal Krishna* v. *Balkrishna Janardan*[2]. Such appeals have been entertained—*Chunia* v. *Ramdial*[3]; *Annamalai Chetti* v. *Cloete*[4]; *Sardarsingji* v. *Ganpatsingji*[5]; *Sardarsingji* v. *Ganpatsingji*[6].

There was no appearance for the respondents.

(1) P. J., 1885, p. 34.
(2) (1886) 10 Bom., 610.
(3) (1877) 1 All., 360.
(4) (1881) 4 Mad., 214
(5) (1889) 14 Bom., 395.
(6) (1892) 17 Bom., 56.

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DADA v. NAGESH.

PARSONS, C. J. (ACTING):—The District Judge refused to hear the appeal presented to him on the ground that the valuation made by the Subordinate Judge was final under section 12 of the Court Fees Act. The facts are these:—The plaintiff sued for a declaration that the purchase in the name of the first defendant was a benámi transaction and for an order that the defendants should execute a conveyance to him. The Subordinate Judge held that this was a suit for specific performance falling under clause x (*a*) of section 7 of the Court Fees Act, and that the plaint should be stamped according to the amount of the consideration money for the purchase, which was Rs. 1,265, and dismissed the suit on the plaintiff failing to pay this amount. Plaintiff appealed on the ground that his suit fell under clause iv (*c*) or (*d*) and had been wrongly dismissed.

The dismissal order was clearly appealable, and the District Judge ought to have entertained the appeal. There was no question of valuation raised in it, for the only valuation made, *viz.*, the value of the consideration, was admitted, but the order was contested on the ground that the Subordinate Judge was wrong in holding that the suit fell within a certain class of cases as defined in the Court Fees Act; in other words, it was contended that the Subordinate Judge was wrong, in law, in holding that the suit was one for specific performance, since it was one for a declaratory decree where consequential relief was prayed.

The distinction between cases in which the valuation of property is in dispute and cases in which the application of the law is questioned is clearly drawn in *Abaji Parashram* v. *Ramchandra Bhimaji*[1]. It is not so clearly expressed in the Full Bench case of *Vithal Krishna* v. *Balkrishna Janardan*[2], but the principle therein laid down that "on the question of whether or not any particular suit was one admitting of valuation by the Judge an appeal lies" depends upon the same distinction, *viz.*, that a decision has to be come to, first, as to the class under which a suit falls, and secondly, upon its valuation in that class, and that an appeal lies from the former In *Kashinath Narayan* v. *Govinda Piraji*[3], the decision should have been made to rest,

(1) P. J., 1885, p. 34. (2) (1886) 10 Bom., 610.
(3) (1890) 15 Bom., 82.

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not upon valuation, but upon the improper inclusion of the suit within the class of cases to which section 17 was applicable. So, too, in *Sardarsingji* v. *Gunpatsingji*[1], the Court entertained the appeal because the lower Court had held that the suit fell under clause ii when it really fell under clause iv of section 7. In *Chunia* v. *Ramdial*[2] there was no question of valuation, but the appeal was entertained so as to "determine whether this suit is one in which specific relief is sought or not, so as to determine under what class of cases it falls for the purpose of the Court Fees Act." In *Annamalai Chetti* v. *Cloete*[3] an appeal was held to lie from the decision of a Court in respect of the class in which a suit ranks. In the present case, the order of the Subordinate Judge is questioned on the same ground, and we are of opinion that on that point an appeal lies.

We reverse the decree of the lower appellate Court, and remand the appeal for trial on the merits. Costs to abide the result.

RANADE, J.:—In this case the suit was brought for a declaration that the appellant-plaintiff was the owner of the land, and that the deed of sale in regard to it was taken in defendant's name as benámidár for the plaintiff. There was a further prayer to the effect that defendant should be required to pass a deed of conveyance to plaintiff. The claim was valued at 50 rupees, and Court fees were paid accordingly. The Court of first instance held that the valuation should be according to the amount for which the sale-deed was passed. The plaintiff failed to pay the additional fees, and his suit was dismissed. In appeal, the District Judge held that no appeal lay to him, as the decision of the Court of first instance was final under section 12 of the Court Fees Act.

There can be no doubt that the lower appellate Court was clearly wrong in dismissing the appeal before it on the ground of the alleged finality of the order made under section 12. There were, no doubt, earlier rulings which might lead to such an inference—*Narayan Madhavrao* v. *The Collector of Thana*[4] and *Manohar Ganesh* v. *Bawa Ramcharandas*[5]; but the whole subject was carefully considered in *Vithal Krishna* v. *Balkrishna*

(1) (1892) 17 Bom., 56
(2) (1877) 1 All., 360
(3) (1881) 4 Mad., 204.
(4) (1877) 2 Bom., 145.
(5) (1877) 2 Bom., 219.

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Janardan [1], and it was laid down that an appeal lies against the decision of the question whether any particular suit was one admitting of valuation by the Judge; but if a valuation made by him is within his proper functions, its essential elements cannot be examined into in appeal. This ruling was followed by this Court in *Sardarsingji* v. *Ganpatsingji* [2] and *Sardarsingji* v. *Ganpatsingji* [3]. The Calcutta High Court has taken this same view in *Ajoodhya Pershad* v. *Gunga Pershad* [4], *Rajkristo Banerjee* v. *Bama Soondaree Dassee* [5] and *Gunga Monee Chowdhrain* v. *Gopal Chunder Roy* [6]. The Allahabad High Court has taken a different view of the section in *Balharan Rai* v. *Gobind Nath Tiwari* [7], but the Madras High Court has preferred to follow in *Kanaran* v. *Komappan* [8] the Calcutta ruling in *Ajoodhya Pershad* v. *Gunga Pershad*.

The Bombay decision noticed above leaves no doubt on the point that the decision of the question of law as to whether a particular suit falls within section 7, clause 4 (*c*) and (*d*), or whether it is a suit for which *ad valorem* duty should be paid, is appealable.

For these reasons, I would reverse the decision of the lower appellate Court, and remand the appeal to the District Court to be disposed of according to law.

Decree reversed and case remanded.

(1) (1886) 10 Bom., 610
(2) (1889) 14 Bom., 395.
(3) (1892) 17 Bom., 53.
(4) (1880) 6 Cal., 240.
(5) (1875) 23 Cal., W. R., 296.
(6) (1873) 19 Cal., W. R., 2 4.
(7) (1890) 12 All., 129.
(8) (1890) 14 Mad. 169.

CRIMINAL REVISION.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

1898.

October 5.

IN RE JIVANJI ADAMJI.*

Criminal Procedure Code (Act V of 1898), Sec. 557—Pleader—Appointment of a pleader to act as Presidency Magistrate—Appointment not forbidden by the Code.

The appointment of a pleader to act as a Magistrate is not forbidden by section 557 or any other provision of the Code of Criminal Procedure (Act V of 1898).

* Criminal Application for Revision, No. 245 of 1898.

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IN RE JIVAN H ADAMJI.

After the Criminal Procedure Code of 1898 had come into force, a practising pleader was appointed to act as a Presidency Magistrate. On his appointment he gave up practising and was not practising at the time the accused was tried and convicted by him of theft. The accused applied to the High Court, in revision, to quash the conviction, on the ground that the appointment of the Magistrate contravened the provisions of section 557 of the Code of Criminal Procedure.

Held, that section 557 of the Code does not deal with appointments, and had no application to the present case, as the Magistrate was not practising at the time the accused was tried and convicted.

APPLICATION under section 435 of the Criminal Procedure Code (Act V of 1898).

Mr. S. B. Spencer was a pleader of the High Court practising, for the most part, in the Presidency Magistrates' Courts.

On the 27th July, 1898, Mr. Spencer was appointed to act as Fourth Presidency Magistrate in place of Khán Bahádur P. H. Dastur. As soon as the appointment was made, he ceased to practise.

On the 29th August, 1898, the accused was charged before Mr. Spencer with theft. The accused was convicted and sentenced to six months' rigorous imprisonment.

The accused thereupon applied to the High Court under its revisional jurisdiction, contending that the conviction was illegal, as the appointment of Mr. Spencer to act as a Presidency Magistrate was in contravention of section 557 of the Criminal Procedure Code.

The High Court sent for the record of the case.

Branson (with him *Ruttonji R Desai* and *Manubhai Nanabhai*) for the accused:—The appointment of Mr. Spencer to act as a Presidency Magistrate was invalid under section 557 of the new Code of Criminal Procedure (Act V of 1898) as he was practising exclusively in the Presidency Magistrates' Courts till the date of his appointment. From the Draft Bill (as printed in the *Gazette of India*, 1898, Part VI, pages 32-33) it appears that the section as originally drafted was much wider in its scope than the section as it now stands. It disqualified every pleader from sitting as a Magistrate in the Presidency towns. The disqualification is now

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IN RE JIVANJI ADAMJI.

limited to those pleaders only who practise in the Presidency Magistrates' Courts. This disqualification is based on public policy, and the intention of the Legislature appears to be to prevent pleaders who practise in the Magistrates' Courts from acting as Magistrates in those Courts.

Lang, Advocate General, for the Crown: —Section 557 of the new Code does not deal with the appointment of a pleader to act as a Presidency Magistrate. The section does not say that no pleader shall be "appointed," but the words used are, no pleader shall *sit*. This means that a pleader cannot practise and at the same time sit as a Magistrate in the Presidency Magistrates' Courts. The section was intended to check the practice prevailing in the North-West Provinces and in the Bengal Presidency, where pleaders used to act as Honorary Magistrates without ceasing to practise. The section has no application to the present case, as Mr. Spencer gave up practising as soon as he was appointed. He is not, therefore, disqualified from sitting as a Presidency Magistrate.

PARSONS, C. J. (ACTING): —It has been argued before us that the conviction in this case by the Acting Presidency Magistrate (Mr. Spencer) is illegal, because his appointment to act as a Presidency Magistrate, dated the 27th July, 1898, contravenes the provisions of section 557 of the Criminal Procedure Code. That section, however, does not deal with appointments; all it says is that "No pleader who practises in the Court of any Magistrate in a Presidency town or district shall sit as a Magistrate in such Court or in any Court within the jurisdiction of such Court." Fortunately it is unnecessary for us to inquire into the object, meaning or general application of the section, or even to endeavour to ascertain what would happen if a pleader did practise and sit as a Magistrate in any Court. It is sufficient to say that Mr. Spencer has not done so in this case. He was a pleader when he was appointed to act as a Presidency Magistrate. The appointment of a pleader to act as a Magistrate is not forbidden by any provision of the Code. On appointment he gave up practising, and he does not now practise. The section has, therefore, no application to him. We dismiss the application.

CRIMINAL REFERENCE.

Before Mr. Justice Parsons, Chief Justice (Acting) and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* BHAU.

1898.
October 6.

Criminal Procedure Code (Act V of 1898), Sec. 337—Pardon tendered to one of the accused—Approver—Trial of approver for non-fulfilment of the condition on which pardon was offered—Practice.

No action can be taken against a person who has accepted a pardon for breach of the condition on which the pardon was tendered until after the case in the Court of Session has been finished, and then his trial should be commenced *de novo*.

REFERENCE under section 438 of the Code of Criminal Procedure (Act V of 1898) by J. B. Alcock, Sessions Judge of Násik.

The reference was in the following terms :—

"I have the honour to submit, for the High Court's revisional orders, the magisterial record of proceedings in the case of *Imperatrix* v. *Bhau valad Bhiva and others* committed to the Sessions Court by H. O. Brooke, Esquire, Magistrate, First Class, Násik,

"Accused No. 1, Bhau valad Bhiva, accepted a tender of pardon made to him by Mr. Brooke, and gave evidence as a witness. The Magistrate thought that he gave false evidence on certain points, though he has not given good reasons for thinking so, and declared the tender of pardon forfeited on the 16th August, 1898. The pardon was tendered on the 2nd August, 1898. The evidence of the witnesses for the prosecution was concluded on 6th August, 1898. The accused were examined on the 16th August. It appears, therefore, that the evidence for the prosecution was not taken in the presence of the accused Bhau, and he was not in the position of an accused person during the hearing of that evidence.

"Following the ruling of the High Courts in Indian Law Reports, 14 Allahabad, 336, and 15 Madras, 352, I hold that the commitment of accused No. 1, Bhau, is not legal, and that he cannot be tried until after the disposal of the case against the other accused.

"I, therefore, recommend that the committal of accused No. 1, Bhau valad Bhiva, may be quashed."

This reference came on for hearing before a Division Bench (Parsons, C. J., and Ranade, J.).

There was no appearance for the Crown or for the accused.

PARSONS, C. J. (ACTING):—The Magistrate, being of opinion that the accused No. 1 had not complied with the condition on which the

* Criminal Reference, No. 109 of 1898.

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tender of pardon was made to him, committed him along with the other accused for trial by the Sessions Court. We think that the commitment is illegal. Section 337 of the Code of Criminal Procedure provides that every person accepting a pardon shall be examined as a witness in the case, and if not on bail shall be detained in custody until the termination of the trial by the Court of Session. It seems, therefore, to be clear that nothing can be done against him till after the case in the Court of Session has been finished, and that then his trial should be commenced *de novo*. This is what has been decided by the other High Courts in India —*Queen Empress* v. *Sudra*(1), *Queen Empress* v. *Mulua*(2), *Queen* v. *Pelumber*(3), *Queen* v. *Bipro Dass*(4), *In re Joydee Paramanick*(5), *Queen Empress* v. *Rama*(6)—and we follow them. The commitment is quashed. After the trial in the Sessions Court is finished, proceedings can, if it is thought necessary, be taken against him.

(1) (1891) 14 All., 336.
(2) (1892) 14 All., 502.
(3) (1870) 14 Cal. W. R., 10 (Cr. Rul.)
(4) (1873) 19 Cal. W. R., 43 (Cr. Rul.)
(5) (1880) 7 Cal. L. R., 66.
(6) (1892) 15 Mad., 352.

CRIMINAL REFERENCE.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898. *November* 15.

NARAYAN GOVIND *v.* VISAJI.*

Criminal Procedure Code (Act X of 1882), Secs. 522, 523, 521—Order to restore possession of immoveable property.

An order made under section 522 of the Criminal Procedure Code (Act X of 1882) restoring possession of immoveable property to a person who has been dispossessed of it by criminal force, is an independent order and may be made subsequently to the date of the conviction of the offender. It need not be made at the same time as the conviction.

The case contemplated by section 522 is that of a person in possession (the complainant) being dispossessed by force by another person (the accused) and the latter being in possession at the date of conviction. In such a case the section gives the Magistrate power to order possession to be restored to the complainant. In the case of a proper order, third persons could not be affected; if they are, the order is not thereby necessarily invalid. Clause 2 of the section gives them a remedy by civil suit.

* Criminal Reference, No. 69 of 1898.

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On 27th September, 1897, complainant charged one Ravlo with criminal trespass under section 447 of the Indian Penal Code (Act XLV of 1860). He alleged that in the previous July, Ravlo had entered into possession of the land and sowed rice upon it, and that when in the month of September, 1897, he (the complainant) went to the field, Ravlo had turned him out by force and refused to vacate the land. On the 17th November, 1897, the case was heard by the Third Class Magistrate, who convicted Ravlo of the offence charged.

On the following day (18th November, 1897) the complainant applied to the Magistrate under section 522 of the Code of Criminal Procedure (Act X of 1882) to be restored to possession of the land and of the standing crops. The Magistrate ordered possession of the land to be restored to the complainant, but attached the crops under Chapter XLIII of the Criminal Procedure Code.

Thereupon one Visaji intervened and claimed the crops as having been sown by himself. His claim was disallowed, and the crops were ordered to be sold and the proceeds credited to Government under sections 523 and 524 of the Code.

Held, that the order made by the Magistrate under section 522 restoring possession of the land to the complainant was bad, because it did not appear that the offence of which the accused was convicted was attended with criminal force, and that the dispossession was due to the use of such force. The illegal entry complained of had taken place in July, 1897. The accused then took possession, and in September, being then still in possession, forcibly resisted the complainant when he attempted to enter upon the land. The complainant, however, did not charge the accused with this assault, but with the trespass which had taken place in July. It is only when the actual use of criminal force leads to dispossession that an order under section 522 can be made.

Held, also, that the order passed under sections 523 and 524 with reference to the crops were illegal. The crops were not property in respect of which the offence was commited, nor were they used in the commission of the offence. They were not such property as is referred to in section 517, 523 or 524 of the Criminal Procedure Code.

Held, also, that the Third Class Magistrate, as such, had no authority to make an order under section 524.

REFERENCE under section 438 of the Criminal Procedure Code (Act X of 1882).

On the 27th September, 1897, complainant Narayan charged the accused Ravlo with criminal trespass upon his field under section 447 of the Indian Penal Code (Act XLV of 1860).

The complainant stated that in July, 1897, Ravlo had illegally entered upon the land in question and sowed rice there, and that

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in September, when the complainant went to the field, Ravlo had turned him out of it and had refused to vacate the land.

The case was heard by the Third Class Magistrate on the 17th November, 1897, and he convicted Ravlo of the offence charged.

On the following day (18th November, 1897) the complainant applied to the Magistrate under section 522 of the Criminal Procedure Code (Act X of 1882) to be put into possession of the land and of the rice crop on it. The Magistrate thereupon ordered possession to be given to the complainant, but directed that the crop should be attached under Chapter XLIII of the Criminal Procedure Code. Subsequently, however, as Ravlo disclaimed all interest in the crop, the Magistrate ordered that after deducting expenses it should be made over to the complainant.

One Visaji then intervened and claimed the crops, alleging that he had sown them, but his claim was disallowed.

Possession of the land was duly given to the complainant on the 29th January, 1898, but the crops were subsequently sold under sections 523 and 524 of the Criminal Procedure Code (Act X of 1882) and the proceeds credited to Government.

Visaji then applied to the District Magistrate, alleging that he had been in possession both of the land and the crops, and had been illegally deprived of both by the order made by the Third Class Magistrate. The District Magistrate thereupon made this reference to the High Court, being of opinion that the order made by the Third Class Magistrate under section 522 on the 18th November, 1897, was illegal, because (1) it had not been made at the time of the conviction and (2) because it prejudiced the right of the intervenor Visaji, contrary to clause 2 of that section.

The reference was as follows:—

"It appears to me that an order under section 522 must be passed at the time of conviction, not subsequently, as was done here. The words of the section are 'whenever a person is convicted,' not 'has been convicted.' In that case I might have considered the order when hearing the appeal from the conviction. But as it is, the order stands separate, and there is no appeal from it.

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"Besides the above reason, I think the order is bad, as it prejudices the right of a third party who was not concerned in the original criminal case."

The reference was heard by a Divisional Bench (Parsons and Ranade, JJ.).

G. S. Mulgavkar for complainant.

B. N. Athavle for Visaji.

PARSONS, J.:—The District Magistrate has referred this case on the ground that the order of the Third Class Magistrate passed under section 522 of the Code of Criminal Procedure is illegal, because it was not passed at the time of conviction and because it prejudices the right of a third party who was not concerned in the original criminal case. The first objection I do not consider to be a tenable one in the present case. The District Magistrate considers that the use of the words "is convicted" necessitates a simultaneous order of restoration which would not have been so had the words used been "has been convicted," but I do not think his view is correct. All that the words mean is that there must be a conviction first had, and then the order can be made. No Magistrate probably would make such an order unless he was asked to do so, and there must be some time allowed for that. Similar words are used in section 519, but there an application is provided for. Section 522 makes no mention of any application, but the words used clearly allow of such being made and give jurisdiction to the Magistrate to make the order after conviction on such application. His order may be considered to be but a continuation of the former proceedings, and he would be the best person to judge whether or not on account of delay the application should be granted. Here there was no delay. The application was made immediately after the conviction, and the order of the Magistrate was passed on the 25th November.

The second objection raised by the District Magistrate seems to be dealt with and provided for by clause 2 of section 522. What the law evidently contemplates is the case of a person in possession (the complainant) being dispossessed by force by another person (the accused) and the latter being in possession at the date of conviction. In such a case it gives the Magistrate power

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to order the complainant to be restored to possession. In the case of a proper order, third persons could not be affected; if they are, then they are given a remedy by civil suit, and the order would not on that account be necessarily bad.

In the present case, however, the order is bad, because, as pointed out by my colleague, the complainant was not dispossessed by the accused by force. The accused had possession both prior to and at the time the force was used. The order, therefore, must be reversed.

The other orders passed by the Third Class Magistrate as to the cutting, gathering, storing, and afterwards selling the crops that were on the land, are clearly illegal. The Magistrate seeks to justify them under sections 523 and 524, but section 523 has no application to the case, and the Magistrate was not empowered to act at all under section 524. These orders must also be reversed.

RANADE, J.:—The principal point raised in this reference relates to the construction to be placed on section 522 of the Code, and appears not to have been previously decided in any reported case. It was formerly raised in a reference made to the Calcutta High Court, but the case was disposed of on other grounds which made it unnecessary to decide the question—*Ram Chandra Boral* v. *Jityandria* [1].

The facts so far as they bear on the point to be considered appear to be, shortly, these. One Narayan Govind obtained possession through the Court of a certain field in execution of his decree against Ravlo Bhagwant in September, 1896. On 27th September, 1897, Narayan brought a complaint against Ravlo of criminal trespass under section 447, in which he stated that Ravlo had illegally entered upon possession of the land about a month and a half previously, and sowed it with rice, and when Narayan went to the field, Ravlo pushed him out and refused to vacate the land or pass a *kabulâyat*. The complaint was heard by a Third Class Magistrate, who convicted Ravlo under section 447, and fined him Rs. 15 on 17th November, 1897. The Magistrate found that Narayan had obtained possession through the Court,

(1) (1897) 25 Cal., 434.

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and that Ravlo had illegally entered upon the land and raised a rice crop on it and had pushed out Narayan when he went to the land in September, 1897. On the 18th of November, 1897, Narayan applied under section 522 to be placed in possession of the land with the rice crop in it. The Magistrate passed an order directing that possession of the land should be given to Narayan, and that the crops should be attached under Chapter XLIII. Later on, as Ravlo had disclaimed all interest in the crops, the Magistrate directed that after deducting expenses the crops should be given to Narayan.

At this stage one Visaji intervened, and put in a claim to the crops as having been sown by him. His objection was overruled, and the land was made over into Narayan's possession on 29th January, 1898. The crops were subsequently sold under sections 523 and 524, and the proceeds were credited to Government. Visaji, the intervenor, then applied to the District Magistrate complaining that he was in possession of the land and had raised the crops, and that he was illegally deprived of the possession of both. The District Magistrate thereupon made the present reference on the ground that the order about the restoration of the possession of the land was illegally made, as such an order under section 522 can only be made at the time of the conviction, and not subsequently. He was of opinion that the order could not be enforced against the intervenor Visaji.

I do not think that the order in question was illegal on either of the grounds stated in the reference. The words used in section 522 are "whenever a person is convicted" and might suggest the interpretation put upon them by the District Magistrate that the order about the possession of the land must be made simultaneously with the conviction of the offence. On a careful consideration, however, of the other sections in the same chapter, which relate to the disposal of moveable property in respect of which an offence has been committed, it is clear that this order is an independent order, and all that section 522 contemplates is that the order can only be made on conviction of the offence. These are the very words used in section 521, which precedes section 522. Section 520 similarly empowers Courts of Appeal

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or Revision to make any order modifying orders made under sections 517, 518, 519. Section 519 expressly contemplates a separate application in respect of orders to be passed under it after conviction. The ruling in *Mohun Luchmi Dass* v. *Pallat Lall*(1), on the corresponding section 531 of the old code, shows that the order is to be based on the finding. The words used in the judgment are "the foundation of the order should be the finding of the Court." In *Ram Chandra Boral* v. *Jityandria*(2) the application was made six months after the conviction. The legality of the order was questioned on this ground, but as the point was not decided, no great stress can be laid on this ruling. On the whole, however, it appears to me that the order in this case made on an application presented the next day after the conviction, was not illegal on the ground stated in the reference.

As regards the second ground, it is clear that the law has provided in paragraph 2 of the section an express remedy for the third parties dispossessed without right, and the intervenor Visaji must be left to his remedy.

While I do not think that the order of the Third Class Magistrate can be set aside on the grounds set forth in the reference, I feel satisfied that the order is illegal on two other grounds, which affect its merits. The section evidently contemplates (1) that the offence of which the accused is convicted must be an offence attended by criminal force, and (2) that the Court must be satisfied that the dispossession was due to the use of such force. Neither of these conditions are satisfied in the present case. The offence charged was criminal trespass, which is defined in section 441 of the Indian Penal Code. Criminal force is defined in section 350, Indian Penal Code. Criminal force is not a necessary element or ingredient of criminal trespass, though when the trespass is committed with an intent to annoy or insult or intimidate, there may be such an ingredient. In the present case, the illegal entry on the land, according to the complainant himself, took place in July, 1897, when Ravlo is alleged to have sown it with rice. Complainant went to the place to-

(1) (1875) 23 Cal. W. R. 15*4*, Cr. Rul. (2) 1897) 25 Cal., 43*4*.

wards the close of September, and Ravlo refused to vacate or pass a *kabuláyat*, and pushed out complainant. Complainant did not bring any charge for this assault, but complained of the trespass which took place some months before. Under these circumstances, it is clear that the offence complained of was not attended by criminal force, nor did the use of such force cause the dispossession. The decision in *Mohunt Luchmi Dass* v. *Pullat Lall*[1] shows clearly that the actual use of criminal force leading to the dispossession complained of, is a necessary condition, and it is only where this is the case that an order under section 522 can be passed. The decision in *Ram Chandra Boral* v. *Jityandria*[2] shows clearly that the words "Offence attended by criminal force" mean an offence of which criminal force is an ingredient. Mere show of criminal force will not suffice to satisfy the requirements of the section. There must be actual use of force, and of criminal force resulting in the dispossession. Both these necessary ingredients are wanting in the present case, and on this ground I must hold that the order about restoration of possession made by the Third Class Magistrate was without jurisdiction, and must be set aside.

The order about the crops was also clearly illegal, as these crops were not property in respect of which the offence was committed, nor were these crops property used in the commission of the offence. The Magistrate could not, therefore, deal with them under section 517, nor could he deal with them, as he professed to deal, under sections 523 and 524, as they were not property referred to in section 51, or alleged or suspected to be stolen. As a Third Class Magistrate, he had, further, no authority to act under section 524 in directing that the crops should be sold and the proceeds should be credited to Government.

Under these circumstances I would reverse both the order about the possession of the land and the disposal of the crops.

Order reversed.

(1) (1875) 23 Cal. W. R., 54, Cr. Rul. (2) (1897) 25 Cal., 434.

APPELLATE CIVIL.

Before Sir L. A. Kershaw, Kt., Chief Justice, and Mr. Justice Fulton.

1898.
November 17.

KESU SHIVARAM MARWADI, PLAINTIFF, *v.* GENU BABAJI POWAR, DEFENDANT.*

Civil Procedure Code (Act XIV of 1882), *Sec.* 257*A—Execution of decree—Agreement between a judgment-creditor and a person other than the judgment-debtor —Postponement of execution.*

The provisions of section 257A of the Civil Procedure Code (Act XIV of 1882) do not include within their scope an agreement between a judgment-creditor and a person other than the judgment-debtor, whereby such person, in consideration of the postponement of the execution of the decree against the judgment-debtor, undertakes to pay to the judgment-creditor a certain sum of money. Such agreements are, therefore, enforceable although made without the sanction of the Court.

REFERENCE by Ráo Sáheb Raghavendra Ramchandra Gangoli, Subordinate Judge of Khed in the Poona District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

Kesu Shivram obtained a decree against Krishnaji bin Hari and applied to the Subordinate Judge for execution. When the bailiff of the Court went to attach Krishnaji's property, one Genu Babaji, at Krishnaji's request, gave a "*havala*" or oral undertaking to Kesu Shivram (the judgment-creditor) that he would pay him Rs. 10 within six months from the 4th August, 1891, in consideration of his not attaching the property (and the property accordingly was not then attached).

This undertaking was not brought to the notice of the Court, nor was it sanctioned by it.

Genu failed to pay the Rs. 10 and Kesu brought this suit against him to recover it with interest from the 4th February, 1892, up to the 1st March, 1898.

The Subordinate Judge on the authority of *Vishnu* v. *Hur Patel*(1) held that the *havala* was an agreement to give time for the satisfaction of the decree, and having been made without the sanction of the Court which passed the decree was void under section 257A of the Code of Civil Procedure (Act XIV of 1882).

* Civil Reference, No. 8 of 1898.

(1) (1888) 12 Bom., 499.

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It was contended on behalf of the plaintiff that section 257A applied only to agreements between the parties to the suit or decree, and not to this case in which the agreement was made with a third person. The Subordinate Judge, having regard to the fact that the rulings in *Ramji* v. *Mahomed*[1], *Swamirao* v. *Kashinath*[2] and *Bank of Bengal* v. *Vyabhoy Gangji*[3] not being expressly dissented from in *Heera Nema* v. *Pestonji*[4], referred the following points to the High Court for decision :—

"1. Is the *havala* or oral agreement in this case enforceable under section 257A of the Code of Civil Procedure, having regard to the recent ruling of the Honourable High Court of Bombay in *Heera Nema* v. *Pestonji*[5] ?

"2. Is the plaintiff entitled to claim interest by way of damages for breach of any such agreement ?

"3. Is an agreement made by a third person at the request of a judgment-debtor for satisfaction of a judgment-debt enforceable, when, in pursuance of such agreement, time is given to such third person to pay the whole or any part of the judgment-debt ?

"4. Is it necessary to bring any such agreement within the purview of the first part of section 257A that it should provide better terms for the decree-holder than the decree gives him ?"

The opinion of the Subordinate Judge on the above points was in the negative.

Balaji A. Bhagavat (*amicus curiæ*) for the plaintiff:—Section 257A applies only to agreements between parties to a suit or decree—*Ramji* v. *Mahomed Walli*[6]; *Harakchand* v. *Totaram*[7]. The agreement here is not between judgment-creditor and judgment-debtor, but between the judgment-creditor and a third person. It does not, therefore, fall within the purview of section 257A. The section is not applicable to third parties, because it relates to proceedings in execution. Where third parties are concerned, the Legislature has made a distinct provision. To allow third parties to certify, would amount to add-

(1) (1889) 13 Bom., 671.
(2) (1890) 15 Bom., 419.
(3) (1891) 16 Bom., 618.
(4) (1898) 22 Bom., 633.
(5) (1898) 22 Bom., 693.
(6) (1889) 13 Bom., 671.
(7) P. J., 1889, p. 377.

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ing them as parties to a decree. The last clause of the section assumes that the judgment-debtor must always be a party to the agreement. It provides that the surplus, if any, should be recovered by the judgment-debtor. This shows that a third person can neither come in under the section, nor can be affected by it.

Chintamani A. Rele (*amicus curiæ*) for the defendant:—The wording of the section is general. It says "every agreement to give time, &c." It, therefore, includes an agreement between a judgment-creditor and a third person. It should not be limited in application to agreements between judgment-creditors and judgment-debtors only—*Vishnu* v. *Hur Patel* [1]; *Heera Nema* v. *Pestonji Dossabhoy* [2].

The section is not limited in its application to execution proceedings only: it is applied to suits also. The object of the section is to avoid delay in execution of decrees and to afford protection to judgment-debtors. Both the objects would be defeated if the agreement in question is held enforceable. A judgment-debtor, instead of being protected from pressure, will be oppressed both by the judgment-creditor and the third person.

The last clause of the section should be read with the second clause and not with the first clause, because the first clause deals only with agreements to give time for the satisfaction of the judgment debt, while the second and third clauses deal with agreements for the satisfaction of a judgment-debt.

The following authorities were also cited in argument:—*Adveappa* v. *Ahmed Saheb* [3]; *Hukum Chand* v. *Taharunnessa Bibi* [4], *Dan Bahadur* v. *Anandi Prasad* [5].

PER CURIAM.—The principal question involved in this reference is whether the provisions of section 257A of the Civil Procedure Code include within their scope an agreement between a judgment-creditor and a person other than the judgment-debtor, whereby such person, in consideration of the postponement of execution of the decree against the judgment-debtor, undertakes to pay to the judgment-creditor a certain sum of money. In coming

(1) (1888) 12 Bom., 499.
(2) (1898) 22 Bom., 693.
(3) P. J., 1891, p 40.
(4) (1889) 16 Calc., 504.
(5) (1896) 18 All., 435.

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to a decision on this point, we have experienced considerable difficulty. Had the matter been *res integra*, the objections to limiting the meaning of the words "every agreement to give time for the satisfaction of a judgment-debtor" so as to exclude agreements of the kind above described, might have seemed insuperable, for it might fairly have been contended that such transactions came within the terms of the section and that it was by no means certain that they did not fall equally within its intention. But the case of *Haralchand* v. *Totaram*(1) is an express authority for holding that where one of the parties to the agreement is not a party to the decree, section 257A cannot be applied. The decision in *Vishnu* v. *Hari Patel*(2) leads, it is true, to a contrary conclusion, but with this exception the tendency of all the cases on the subject, to which we have been referred, supports the dictum in *Ramji* v. *Mahomed Walli*(3) that section 257A applies only between the parties to the decree.

In these circumstances we do not feel that we should be justified in departing from the current of decisions expressing the views of a series of Judges during a considerable period. Transactions may have been entered into on the faith of these decisions, and we think it would be unfortunate if we were compelled now to hold that they were wrong. But this seems unnecessary. The last clause of the section which assumes that the judgment-debtor must always be a party to the agreement, indicates the class of agreement to which the section refers. One of the objects of the section probably was to protect the judgment-debtor from undue pressure, but it seems less likely that such pressure could be successfully exerted on persons not subject to the decree. We must, therefore, answer the first question in the affirmative, holding that the *havala* or oral agreement in this case is enforceable notwithstanding the provisions of section 257A of the Civil Procedure Code.

The second question does not admit of a categorical answer. There being no agreement to pay interest, and no demand of payment apparently having been made in writing under Act XXXII of 1839, no interest is due. If the plaintiff proves

(1) P. J., 1889, p. 377. (2) (1888) 12 Bom., 499.
(3) (1889) 13 Bom., 671.

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damages for breach of contract, such compensation as appears just can be awarded.

The third and fourth questions do not appear necessary for the determination of this suit.

Order accordingly.

APPELLATE CIVIL.

Before Sir L. A. Kershaw, Kt., Chief Justice, and Mr. Justice Fulton.

1898. *November 22.*

NARAYAN HARI DEVAL AND OTHERS (ORIGINAL DEFENDANTS), APPLICANTS, *v.* KESHAV SHIVRAM DEVAL (ORIGINAL PLAINTIFF), OPPONENT.*

Water—Water-course—Riparian owners, rights of—Mamlatdar—Jurisdiction—Mamlatdars' Act (Bom. Act III of 1876), Sec. 4.

The law as to riparian owners is the same in India as in England, and is stated in illustration (*h*) of section 7 of the Easements Act (V of 1882). Each proprietor has a right to a reasonable use of the water as it passes his land, but, in the absence of some special custom, he has no right to dam it back, or exhaust it, so as to deprive other riparian owners of like use

What would constitute an unreasonable diversion of water such as to disturb the use of the lower riparian owners, is a question of fact which the Legislature has given a Mamlatdár jurisdiction to decide.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Ráo Sáheb M. S. Vinekar, Mámlatdár of Alibág in the Thána District, in a summary suit under the Mámlatdars' Act (Bom. Act III of 1876).

Suit for injunction. The plaintiff alleged that he was entitled to the use of water which flowed to his rice land through a natural water-course and that the defendants had dug a trench by means of which they diverted the water to their own land.

The defendants pleaded that the plaintiff had no right to the water, and they denied that the Mámlatdár had jurisdiction to hear the suit.

The Mámlatdár found that the plaintiff had enjoyed the use of water flowing through the water-course as alleged; that the defendants had obstructed him in such enjoyment; and that their obstruction had commenced within six months before the suit was filed. He, therefore, allowed the claim and granted the injunction.

* Application, No. 168 under extraordinary jurisdiction

1898.

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The defendants applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling on the plaintiff to show cause why the decision of the Mámlatdár should not be set aside.

Vinayak V. Ranade appeared for the applicants (defendants) in support of the rule:—The Mámlatdár found that the water flowed through a natural water-course. We are entitled to obtain as much water from the water-course as we require for our use. The question as to what quantity of water is reasonable for our use cannot be decided by the Mámlatdár under his summary jurisdiction—*Babaji Ramji* v. *Babaji Deiji*[1].

Vasudeo G. Bhandarkar for the opponent (plaintiff) showed cause.

PER CURIAM:—This suit was brought in the Mámlatdár's Court by the plaintiff to obtain an injunction requiring the defendants to refrain from causing, or attempting to cause, further disturbance or obstruction in the use of water from a certain water-course. The Mámlatdár found that the plaintiff had been in the habit of using, for the irrigation of his land, the water which came by a natural water-course across the defendants' land, and that the defendants had disturbed his enjoyment of this use by digging a trench whereby the greater part of the water was diverted on to their own land. The Mámlatdár, therefore, gave the injunction sought in terms similar to those contained in Schedule C to the Act. The defendants have now applied to this Court alleging a want of jurisdiction in the Mámlatdár's Court. It, therefore, becomes necessary to examine section 4 of the Act and the law with regard to water-courses as it affects the rights of riparian proprietors.

The material portions of the section are as follows:—

> The Court shall also have power . . . when any person is disturbed or obstructed, or when an attempt has been made to disturb or obstruct any person . . . in the use of water . . . from any water-course , . . , to issue an injunction to the person causing, or who has attempted to cause such obstruction or disturbance requiring him to refrain from causing or attempting to cause any such further disturbance or obstruction.

(1) (1897) *ante* p. 47.

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The issues which the Mámlatdár in such a case is required to frame are:—

1. Whether the plaintiff is actually in enjoyment of the use claimed?

2. Whether the defendants are disturbing or obstructing or have attempted to disturb or obstruct him in such enjoyment?

3. Whether such disturbance or obstruction or such attempted disturbance or obstruction first commenced within six months before the suit was filed?

Now, there is nothing in the section to restrict the word "water-course" to artificial channels. If such restriction had been intended, it would doubtless have been expressed; but no reason is apparent why it should have been so intended. The Mámlatdár has found that this channel was a water-course. The water doubtless flowed intermittently, but when the rains came, it flowed in a defined channel or course. It thus fulfilled the definition of a natural stream given in the explanation of section 7 of the Easements Act. "A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of the land or under ground, which flows by the operation of nature only, and in a natural and known course." It is impossible to say that the channel of such a stream is not a water-course.

The law in regard to riparian proprietors is the same in India as in England, and is stated in illustration (*h*) of the same section. Each proprietor has a right to a reasonable use of the water as it passes his land, but in the absence of some special custom or easement, he has no right to dam it back or exhaust it so as to deprive other riparian owners of like use. This is explained by Chief Justice Westropp in *The First Assistant Collector of Násik* v. *Shamji Dasrath*[1] as follows:—"All the occupants of land on the banks being equally entitled, each occupant, or set of occupants, is bound to use his right so as not materially to interfere with an equally beneficial enjoyment of it by other occupants."

Here, the Mámlatdár, after visiting the spot and taking the evidence of the parties, has found that as a fact the plaintiff was in the habit of using the water of this stream for irrigation, and

(1) (1878) 7 Bom., 209 at p. 212.

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that quite recently the defendants by draining it off have deprived him of nearly the whole of it. The defendants, it is true, were entitled, like the plaintiff, to use the water reasonably for purposes of irrigation; but they were not entitled to exhaust it so as to deprive the plaintiff of his fair share. If they did so, we think their act would constitute a disturbance of the plaintiff's use notwithstanding that their operations were wholly conducted within the limits of their own land. The plaintiff's use would be as effectually disturbed by the act of a neighbour in preventing the water from reaching him, as it would be if that neighbour came on to his land and carried it off in buckets.

What would constitute an unreasonable diversion of the water, such as to disturb the use of the lower riparian owner, would be a question of fact for the decision of the Mámlatdár according to the circumstances of the case. The question might be a difficult one depending on the due apportionment of the water; but we think it is one which the Legislature has given the Mámlatdár jurisdiction to decide, thinking possibly that for water disputes a speedier remedy than the ordinary Courts can afford is often desirable in the interests of agriculture and for the preservation of the peace. The party dissatisfied with the decision can seek redress by a regular suit in the Civil Court.

The learned pleader for the applicants pressed us in argument with the decision of this Court in *Babaji Ramji* v. *Babaji Devji*[1], but that was a peculiar case in which the parties relied, not so much on their general rights as riparian owners, as on some custom by which each owner in turn had dammed and impounded the water. We do not think that we can accept it as an authority governing the present case. The rule must be discharged with costs.

Rule discharged.

(1) (1897) *ante* p. 47.

ORIGINAL CIVIL.

Before Mr. Justice Fulton.

1899. *March 7.*

MERWANJI MANCHERJI CAMA AND ANOTHER (PLAINTIFFS) *v.* SYED SIRDAR ALI KHAN, DEFENDANT.*

Landlord and tenant—Lease—Covenant for quiet enjoyment—Covenant implied—Interruption of tenant's enjoyment by order of plague officials—Suit for rent.

A lessor sued to recover from his lessee rent for fifteen months from 1st August, 1897, to 31st October, 1898, under an agreement for lease for ten years dated 1st September, 1890, *i. e.* prior to the application of the Transfer of Property Act (IV of 1882) to Bombay. The defendant contended that in the agreement there was an implied covenant for quiet enjoyment, and that as he had been compelled by the plague authorities to vacate the premises from 5th February, 1898, to 1st April, 1898, there had been a breach of the covenant. He claimed, therefore, to deduct the rent for that period or to be allowed it as a counter-claim as damages for disturbance.

Held (giving judgment for plaintiff) that even assuming that, in the agreement for the lease, a covenant for quiet enjoyment was to be implied, such a covenant could only be one for the quiet enjoyment by the defendant so long as it was lawful for him to enjoy the property. No guarantee against the acts of Legislature could be read into the implied covenant for quiet enjoyment.

SUIT to recover rent. The plaintiff claimed Rs. 3,225 as rent due to him for certain stables under an agreement for a lease dated 1st September, 1890.

The said agreement was executed to the defendant's father, who died in May, 1896. It was an agreement for a term of ten years from the 1st October, 1890, and the monthly rent was Rs. 215; the lessee also to pay Rs. 6 per month municipal taxes.

The defendant was the executor of the lessee (his father), and he had paid the rent subsequently to his father's death down to 31st July, 1897.

The plaintiff now claimed the sum of Rs. 3,225, rent due for fifteen months from 1st August, 1897, to 31st October, 1898.

The defendant pleaded that there was an implied covenant for quiet enjoyment, and that notwithstanding that covenant his (the defendant's) enjoyment of the property had been interrupted from

* Suit, No. 685 of 1898.

the 5th February, 1898, to the 1st April, 1898, during which period he had been obliged to vacate the premises under orders received from the district plague officer. On the 31st August, 1898, he was again obliged to vacate under orders from the same authority, and he had been prohibited from allowing the premises to be used as the residence of his horse-keepers.

He contended that by reason of such interruption of enjoyment, from 5th February, 1898, to 1st April, 1898, he was not liable for the rent for that period. He further contended that since the plague authorities had now prohibited the use of the premises as a habitation for his grooms it had become unlawful for the plaintiff to maintain the defendant in the enjoyment of them in the manner intended at the date of the lease, and that, therefore, the whole lease was void, and that he was not liable for any rent after the 31st August, 1898.

He further counter-claimed for the sum of Rs. 383-14-10 as damages for disturbance from 6th February to 31st March, at the rate of Rs. 215 a month, and further damages at the same rate from 31st August, 1898, until judgment. He also counter-claimed for the sum expended by him in renting land and erecting other stables thereon for use during the period of interruption.

He brought into Court the sum of Rs. 2,403-8-3, being the rent due for the time mentioned in the plaint, exclusive of the period of the alleged interruption.

At the hearing the following issues were raised :—

(1) Whether, having regard to the interruptions referred to in the written statement, defendant is liable to pay rent and taxes for the periods mentioned.

(2) Whether by reason of the prohibition, by the proper authorities, of the use of the property for the habitation of the defendant's horse-keepers, the lease became void as stated in the 4th paragraph of the written statement ?

(3) Whether, in the event of the 1st issue being answered in favour of the plaintiff, the defendant is entitled to recover from the plaintiff damages for the disturbance of his enjoyment, at the rate of Rs. 215 per mensem, during the period of such disturbance ?

(4) Whether the defendant is entitled to recover from the plaintiff a sum of Rs. 793-7-6, being the expenses incurred by the defendant in consequence of the interruptions ?

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(5) Whether the plaintiff is entitled to recover any and what sum in excess of the amount brought into Court by the defendant on the 16th February?

Vicaji, for plaintiffs:—There was no formal lease of the premises. They were let merely under articles of agreement for a lease. There is no covenant for quiet enjoyment. The agreement was made before the Transfer of Property Act (IV of 1882) was applied to Bombay and long before the plague appeared in Bombay. He referred to *Bombay and Persia Steam Navigation Company* v. *Rubattino Company*[1]; *Newby* v. *Sharpe*[2].

Raikes, for defendant:—A covenant for quiet enjoyment is implied -Woodfall Landlord and Tenant (14th Ed.), p. 695; *Rassam* v. *Douzelle*[3]; *Lali Kunwar* v. *Carter*[4]; Contract Act (IX of 1872), Sec. 56.

FULTON, J.—In this case the plaintiff has sued to recover rent due from the defendant under a lease for ten years, dated the first September, 1890.

The defence is that, as the defendant was obliged to vacate the premises under notices from the plague authorities, he is not liable for the rent for the periods mentioned in the written statement, or in the alternative is entitled to certain sums as damages for disturbance of his enjoyment.

The material facts having been admitted, the following issues were raised: (His Lordship stated the issues.)

My finding on the 1st issue is in the affirmative: on the 2nd, 3rd and 4th issues in the negative; and on the 5th in the affirmative, *viz.*, that plaintiff is entitled to recover the whole amount claimed.

The lease is anterior to the introduction into Bombay of the Transfer of Property Act, but assuming that it contains an implied contract for quiet enjoyment, it seems necessarily to follow that the contract is merely for the quiet enjoyment of the property by the tenant so long as it is lawful for him so to enjoy it. It cannot be a contract for the tenant's quiet enjoyment of the property contrary to law. Such a contract if stated in express terms would clearly be void. It would

(1) (1889) 14 Bom., 147.
(2) (1878) 8 Ch. D., 39.
(3) (1874) 23 Cal. W. R., 121.
(4) (1876) 25 Cal. W. R., 192.

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be equally void if the intention could be implied. Consequently, I think that, when under the provisions of Act III of 1897 it became unlawful for the tenant to occupy the premises in the manner contemplated by the lease, there was no breach of the lessor's contract for quiet enjoyment. There being then no breach by the lessor, there is no ground on which the lessee can either be relieved of the rent which he agreed to pay or be awarded damages against the lessor. The lease doubtless might have provided that, in the events which have happened, the tenancy should come to an end, but those events were not foreseen, and were, therefore, not provided for. The case of *Newby* v. *Sharpe*[1] is in point. Of course, that was a case where the conditions had been expressed, but I cannot read into the implied condition for quiet enjoyment a guarantee against acts of the Legislature. No authority was cited for such a construction of the lease.

Decree for plaintiff for sum claimed and costs, and interest on judgment at 6 per cent.

Decree for plaintiff.

Attorneys for the plaintiff :—Mr. *K. D. Shroff.*

Attorneys for the defendant :—Messrs. *Crawford, Brown & Co.*

(1) (1878) 8 Ch. D., 39.

APPELLATE CIVIL.

Before Sir L. A. Kershaw, Kt., Chief Justice, and Mr. Justice Fulton.

PARVATI (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANPATI ROKDAJI NAIK AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1898. *December* 8.

Limitation Act (XV of 1877), Sec. 5—Appeal not presented in time—Sufficient cause for delay—Discretion of Judge—Second appeal—Civil Procedure Code (Act XIV of 1882), Sec. 584—Exercise of discretion not to be interfered with.

Where an appeal has been dismissed as barred by limitation, the lower Court holding that there was no sufficient cause for not presenting it within the prescribed time, the High Court can only interfere in second appeal if that decision

* Second Appeal, No. 924 of 1897.

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is contrary to law, that is, if the lower Court has exercised its discretion capriciously or arbitrarily or without proper legal material to support its decision.

SECOND appeal from the decision of J. B. Alcock, District Judge of Nasik, dismissing an appeal against the decree of Ráo Sáheb D. G. Gharpure, Subordinate Judge of Malegaon.

The plaintiff sued to recover possession of certain land from which she alleged she had been unlawfully ousted by the defendant. The Subordinate Judge allowed the claim with respect to a moiety of the land, and on the 10th January, 1896, passed a decree accordingly.

The plaintiff appealed.

At the hearing of the appeal it appeared that the appeal was presented on the 24th February, 1896, that is, after the period of thirty days allowed for appeal had expired (see Limitation Act (XV of 1877), Art. 152). It was urged in excuse that the plaintiff lived in a village in the Nándgaon Táluka, at which there was no post office. She had, however, received information on the 17th January of the judgment which had been delivered on the 10th. She applied for copies of the judgment, &c., on the 1st February, and they were ready on the 10th February. Under these circumstances the Judge held that there was no sufficient cause for the delay, and he dismissed the appeal as barred by limitation. In his judgment he said:—

"Judgment was delivered on the 10th January, 1896. Appellant's pleader sent her intimation of this by post on the 13th January; she lives in a village in the Nándgaon District where there is no post office. The letter was sent to her by a round-about route and she did not get it till the 17th January. Still there was plenty of time to get the necessary copies and file an appeal within time. The application for copies, however, was not made till the 1st February. The copies were ready on the 10th February. There seems no reason why the appeal should not have been in time except want of due diligence."

Daji Abaji Khare for the appellant (plaintiff):—The lower Court was wrong in rejecting the appeal. It had a discretion to admit it—Limitation Act (XV of 1877), Sec. 5. We submit that, having regard to the circumstances, that discretion was not properly exercised. The plaintiff is an illiterate woman. A considerable part of the thirty days allowed for appeal had expired before she received intimation of the judgment. Communication

with the village in which she lives is difficult, there being no post office there. She took immediate steps to file an appeal, but there was unavoidable delay. It is clear she acted *bonâ fide* throughout. We submit that the appeal ought to have been allowed.

Mahadev B. Choubal for the respondents (defendants):—This is a second appeal, and in second appeal this Court cannot interfere with the order of the lower Court, except on a point of law—Civil Procedure Code (Act XIV of 1882), Sec. 584. The question before the lower Court was whether, under section 5 of the Limitation Act (XV of 1877), there was sufficient cause to excuse the delay in filing the appeal. That was a matter for the discretion of the lower Court, and in the exercise of that discretion it held, on the facts before it, that there was no sufficient cause for the delay. That is not a question of law, and there is, therefore, no ground for a second appeal to this Court. The exercise of his discretion by a Judge will not be interfered with by the High Court in second appeal.

The following authorities were cited in argument:—*Dadabhai* v. *Manekshа*[1]; *Balkrishna Keshav* v. *Gangabai*[2]; *Damodar Ganesh* v. *Ganesh Ramchandra*[3]; *Ranchodji* v. *Lallu*[4]; *Fatima Begam* v. *Hansi*[5]; *Mowree Bewa* v. *Soorundarnath*[6]; *Surbhai Dayalji* v. *Raghunathji Vasanji*[7]; *Bai Devkore* v. *Lalchand*[8].

PER CURIAM:—This case comes before us under section 584 of the Civil Procedure Code, which gives the right of appeal from appellate decrees on the grounds stated therein. The only ground on which appellant can come here is that set out in clause *(a)* "the decision being contrary to some specified law or usage having the force of law." The decision was under section 5 of the Limitation Act (XV of 1877). The time for appeal was thirty days *plus* the days required for obtaining copies. The time could be extended if the Judge was satisfied that there was sufficient cause for not presenting the appeal within the prescribed time. On reading the affidavit and hearing arguments,

(1) (1896) 21 Bom., 552.
(2) P. J., 1896, p. 617.
(3) P. J., 1897, p. 214.
(4) (1882) 6 Bom., 304.
(5) (1887) 9 All., 244.
(6) (1868) 10 Cal. W. R., 178.
(7) (1873) 10 Bom. H. C. Rep., 397.
(8) (1894) 19 Bom., 790.

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the Judge was not satisfied that there was sufficient cause. We can only interfere if this decision was contrary to law.

The Judge had a discretion to decide on the application, and it becomes necessary to enquire (1) what is the meaning and extent of such discretion, and (2) under what circumstances it can be said to be illegally exercised. In *Sharp* v. *Wakefield* [1] Lord Halsbury, L. C., observed:

'An extensive power is confided to the justices in their equity as justices to be exercised judicially, and 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion—*Rooke's Case* [2], according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself—*Wilson* v. *Rastall* [3]. So in *Reg.* v. *Butler* [4], where justices thought proper not to enforce the law because they considered that the Act in question was unjust in principle, the Court of Queen's Bench compelled them by a peremptory order to do the act which nevertheless the statute had said was in their discretion to do or leave undone. So, again, in the case of overseers who were required by 3 and 4 Vict., c. 61, to certify whether applicants for beer licences were real residents and ratepayers of the parish, it was held that they were not entitled to refuse the certificate on the ground that, in their opinion, there were already too many public-houses, or that the beer shop was not required. So a discretion which empowered justices to grant licenses to inn keepers as in the exercise of their discretion they deemed proper would not be exercised by coming to a general resolution to refuse a license to everybody who would not consent to take out an excise licence for the sale of spirits—*Reg.* v. *Sylvester* [5]."

The general result of the cases is stated by Wills, J., in *Sharpe* v. *Wakefield* [6] as follows:—

"So far it is, I think, impossible to contend that there was * * * * * * * * * * any limitation upon the absolute discretion of the justices, when applied to for a new licence, to grant or refuse it upon any grounds which to them seem fit grounds to act upon, provided that there is a real judgment exercised in respect of the individual case. I mean to exclude, for instance, a case in which the ground of refusal had absolutely nothing to do with the question in hand, as for instance where the justices refused the licence because the applicant had not taken out a spirit licence—*Reg.* v. *Sylvester*, or

(1) (1891) A. C., 173 at 179.
(2) 5 Rep., 100, a.
(3) 4 T. R., at p. 757.
(4) 33 L. J. M. C., 101.
(5) 31 L. J. M. C., 93.
(6) (1888) 21 Q. B. Div. 66, at p. 80.
(7) 2 B. & S., 322.

where they had laid down a general rule that they would grant no more licences in the locality—*Reg.* v. *Justices of Walsall* [1]. In such cases, there is really no exercise of discretion at all, and it is very much as if the licence had been refused because the applicant wore a blue coat or a white hat. But where it cannot be shown that no real discretion has been exercised, the applicant has, in case of refusal, no other resort, and must submit to his fate."

Applying this principle we have to consider whether in the present case we are satisfied that the Judge has exercised no real discretion. If he had evidence before him, which would fairly warrant a reasonable man in his position coming to the conclusion at which he arrived, it cannot be contended that he exercised no real discretion. In such case, there would be no question of law involved, but he would be deciding a question of fact on reasonable and proper grounds which would not entitle this Court to interfere. It has even been decided in such a case that the mere fact that the Court above would have come to a different conclusion is no ground for interference—*Ranchodji* v. *Lallu*[2] and *Fatima Begam* v. *Hansi*[3]. The effect of the decision of this Court in Special Appeal No. 325 of 1872 (*Surbhai Dayalji* v. *Raghunathji Vasanji and others*[4]) was similar. In that case Melvill and West, JJ., observe—

"We are of opinion, however, that we have power to interfere when such discretion is exercised without any proper legal material to support it. In the present case, the reason given by the District Court for the admission of the appeal, is one which, in our opinion, is not a legal or valid reason, and we must, therefore, treat the admission of the appeal as an error in law. This view is in accordance with that taken by the Calcutta High Court in *Mowree Bewa* v. *Soorundanath Roy*[5]."

With regard to the decisions in *Balkrishna Keshav Khare* v. *Gangabai*[6] and *Damodar Ganesh Joshi* v. *Ganesh Ramchandra Kanitkar and another*[7], we think it probable that the learned Judges who decided those cases were of opinion that on the facts no real judicial discretion had been exercised. We were specially pressed with the latter of those two decisions, but we think it must have been decided on the same principle. In the present case it seems to us impossible to argue that the Judge acted cap-

(1) 3 C. L. R., 100.
(2) (1882) 6 Bom., 304.
(3) (1887) 9 All., 244.
(4) (1873) 10 Bom. H. C. R., 397.
(5) 10 Cal. W. R., 178.
(6) P. J., 1896, p. 617.
(7) P. J., 1897, p. 214.

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riciously or arbitrarily, or not in accordance with the rules of reason or justice; or that he came to his decision without any proper legal material to support it, or that his discretion was not exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself, or that there was in fact no real judgment exercised in the matter. It seems to us that he had ample material before him to find as he did, and that he has exercised a judicial discretion and a real judgment in this matter. We must, therefore, confirm the decree of the lower appellate Court with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *January* 9.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF), APPELLANT, v. SITARAM SHIVRAM AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Trees—Right to cut trees—Khoti khasgi land in the Ratnágiri District—Dunlop's proclamation—Construction—Crown grant—Right to rescind.

Defendants were *khots* of the village of Ojharkhol in the Ratnágiri District, of which a certain plot (Survey No. 2?) was their *khoti khasgi* land. In 1894 they cut down a large number of teak trees growing on this land. Thereupon the Secretary of State for India in Council sued to recover their value, alleging that they were the property of Government.

Defendants pleaded that they were the absolute owners of the trees, and relied in support of their title on a proclamation issued by Government in 1824, known as Mr. Dunlop's proclamation. This proclamation had been subsequently rescinded by Government in 1851. The material part of Mr. Dunlop's proclamation was in the following terms:—

"Upon the teak and other trees that may be on any person's land, Government has no design. He whose trees may now exist, or he whose trees may hereafter grow, may make such use of them as he pleases. Government will not offer the slightest obstruction."

Held, that this proclamation was not a mere promise, but an actual grant or gift of the teak trees to the persons on whose lands they were then actually growing, or might thereafter grow, and that the gift could not be revoked.

* Appeal No. 100 of 1897.

1899.

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Held, also, that by reason of this proclamation Government had no right to the teak trees growing on the land in question.

APPEAL from M. P. Khareghat, Acting District Judge of Ratnágiri.

In this case the Secretary of State for India in Council sued to recover the value of about seventy teak trees standing in Survey No. 52 in the village of Ojharkhol cut down by defendants in December, 1894, without the permission of Government. The plaintiff alleged that Government was the owner of the trees.

Defendants pleaded that they were *khots* of the village; that the land in which the trees were grown was their *khoti khasgi* land; that they were the absolute owners of the trees under a proclamation issued by Government in 1824, commonly known as Dunlop's proclamation, and that they had a right to deal with the trees as they liked.

Mr. Dunlop's proclamation was to the following effect:—

"Whereas the Government has observed that as the former Government used to take the teak, blackwood and other good timber grown on the lands situate in the aforesaid zilla (Ratnágiri) belonging to any person whatever, the people did not take the trouble of (raising such timber trees); and (whereas the Government) thinks that it would be to the advantage of all, if from this day forth teak, blackwood, and any other kind of good timber trees were raised in the country, it is proclaimed to all the people that the Government has no intention (eye) towards the trees that may be growing on the lands of any person whatever situate beyond the frontiers of the jungles preserved by Government . . . . . that those who may own and may grow hereafter (such trees), may deal with them in any manner they like; and that no obstruction whatever will be made by Government (to their so doing)."

This proclamation was rescinded by a subsequent proclamation in 1851.

The District Judge was of opinion that the right to the trees, having been surrendered by Government under Mr. Dunlop's proclamation, could not be resumed except under an Act of the Legislature. He, therefore, dismissed the suit.

Against this decision the plaintiff appealed to the High Court.

Lang, Advocate General (with him Ráo Bahádur *Vasudev J. Kirtikar*, Government Pleader), for appellant.

Daji Abaji Khare (with *M. R. Bodas*) for respondents.

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The following authorities were referred to in argument:—*The Collector of Ratnagiri* v. *Vyankatrav* [1]; *The Collector of Ratnagiri* v. *Antaji* [2], *In re Antaji Keshav Tambe* [3]; *The Collector of Ratnagiri* v. *Raghunathrav* [4]; *Nagardas* v. *The Conservator of Forests* [5].

PARSONS, J.:—The point that arises for our decision in this appeal is whether the defendants are the owners of the teak trees in Survey No. 52. The defendants are the khots of the village of Ojharkhol, and Survey No. 52 is admittedly their khasgi land, that is to say, it is for all practical purposes their own property and would remain theirs so long as they paid the Government assessment upon it even if the khotship were resumed by Government. It is also admitted that the proclamation of Government commonly known as Dunlop's proclamation applied to the lands of the village of Ojharkhol.

It was, however, argued by the learned Advocate General on behalf of the plaintiff, (1) that the effect of the proclamation was not to give the trees to the owner of the lands it referred to, but was merely a declaration of the intention of Government amounting to a promise which could be revoked at any time unless the owner could show that he had changed his position on the strength of the promise; and (2) that whatever was promised under the proclamation was revoked in 1851.

There is no doubt of the truth of the second part of the argument. Clause 4 of the proclamation of 1851 is as follows:—"The Right Hon'ble the Governor in Council is pleased to declare that the proclamation of 1823 (sic) is rescinded, and that the Government resumes, in regard to forest, all the sequestrial rights which it possessed previous to 1823." It is only necessary therefore, to consider the first part of the argument.

Dunlop's proclamation has been before this Court on several occasions, and, therefore, it is not necessary now to quote it in full. It will be found in print in the cases of *The Collector of Ratnágiri* v. *Vyankatrav* [6], *The Collector of Ratnágiri* v. *Antaji*

(1) (1871) 8 Bom. H. C. Rep., 1 (A. C. J.)
(2) (1889) 12 Bom., 534.
(3) (1893) 18 Bom., 670.
(4) P. J. for 1875, p. 321.
(5) (1879) 4 Bom., 261
(6) (1871) 8 Bom. H. C. Rep. 1 (A. C. J.)

Lakshman[1], and *Re Antaji Keshav Tambe*[2]. In the latter case will also be found the letter of Mr. Dunlop to Government in which he formulates his propositions. I will only quote in addition a paragraph from the letter of Government (No. 1630 of the 1st November, 1823) written in reply to that letter. It is paragraph 4 and runs as follows :—

"The Honble the Governor in Council approving of the suggestions contained in the 28th paragraph authorises you to issue a proclamation surrendering all claims to teak or other valuable wood beyond the limits of the three forests of Band Toodil and Venhere in the Surrounding Táluka and of Mhun near Malvan."

In the face of these letters and of the terms of the proclamation itself it seems clear that the argument fails. The proclamation was not a mere promise that the Government then made, but an actual grant or gift of the teak trees to the persons on whose lands they were then actually growing or might thereafter grow. The actual words of it are these. '*Jyache jagyawar sagwan wagaire jhade asatil, tyawar sarkarcha mada nahi, jyachi jhade asatil ti va pude karatil ti tyanc apal' khushis yeil tashi vahivat karavi; sarkarantun adthala kahi jasta honar nahi;*" and I translate them thus: "Upon the teak and other trees that may be on any person's land Government has no design (*mada* may also be used to mean 'claim,' 'right' or 'title,' - see Molesworth's Dictionary). He whose trees may now exist and he whose trees may hereafter grow should make such use of them as he pleases. Government will not offer the slightest obstruction." This construction of the proclamation as a grant was evidently not disputed in the case of *The Collector of Ratnagiri* v. *Vyankatrav*[3], and although the learned Chief Justice who delivered the judgment of the Court said that the decision must be held to be limited to the particular case before him, the ruling of the Court is important since in two points it governs the present case, *viz*, (1) in deciding that the khot is the proprietor of his khasgi land, and (2) in deciding that a gift, if made by the proclamation, could not be revoked without the consent of the donee. I purposely omit the mention made in it of khoti nisbat

(1) (1888) 12 Bom., 534. (2) (1894) 18 Bom., 671.
(3) (1871) 8 Bom. H. C. Rep., 1 (A. C. J.)

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land, for it, though used apparently in the judgment as synonymous with khoti khasgi land, is really a term of wider comprehension including that land and much other land also. In the case, however, of *Re Antaji Keshar Tumba*[1] the construction that I have placed on the proclamation was expressly affirmed. In it Telang, J., says of Dunlop's proclamation that by virtue of it "the trees then growing and thereafter to be planted on the land became the landholder's property free from any right on the part of Government" and Fulton, J., holds that "Dunlop's proclamation did grant the right to teak and other forest trees in the khasgi lands held by vatandar khots."

The decisions in which it has been held that the teak trees were not the property of the khots, are plainly distinguishable. They are all cases in which the trees stood on waste or forest lands and were claimed by the khots as khots (see *The Collector of Ratnágiri* v. *Raghunathrao*[2], *Nagardas* v. *The Conservator of Forests*[3], *The Collector of Ratnágiri* v. *Antaji Lakshman*[4]). For such a claim to be successful it has been held that it would be necessary to prove a grant of the soil to the khots. In the case of khasgi lands, however, proprietary title in them is proved by the very term itself, for they are lands which belong to the khot as having been acquired by him either by his own expenditure of money in bringing them into cultivation, or by lapse or forfeiture from those who originally owned them or by purchase. His ownership of these lands in no wise depends upon his tenure of the khotship, for, as I have before remarked, were the khotship abolished, he would continue to hold them and would then become an occupant of them as defined in the Land Revenue Code. The District Judge, therefore, was quite right in his decision, and his decree is confirmed with costs.

In Appeal No. 99 the decree is also confirmed with costs.

RANADE, J.:—In these appeals, which were heard together, the only question to be considered is whether Government, which was plaintiff in both cases, was the sole owner of the teak trees in dispute. The trees were admittedly cut by the respondent-defendants, who

(1) (1893) 18 Bom., 670.
(2) P. J., 1875, p. 324.
(3) (1879), 1 Bom., 264.
(4) (1888) 12 Bom. p. 541.

are khots of the villages in which the thikáns where the trees grew were situated. It was further admitted in the argument by the learned Advocate General, who appeared for the appellant, that these thikáns were khoti khasgis, and that the proclamation of Mr. Dunlop applied to the two villages to which the thikáns belong.

It was, however, contended that the proclamation did not make the defendant-khots owners of the teak trees, and did not deprive Government of its rights to the same. The proclamation, it was urged, was only a promise, and, until it could be shown that the promise had been acted upon, Government had a right to withdraw and cancel the proclamation, as, in fact, it did in 1851.

The question at issue is thus narrowed to the inquiry as to the nature and extent of the respondent-defendants' interest in the teak trees growing in khoti khasgi lands in villages included in the proclamation of 1823. Khoti khasgi lands have been thus defined in Mr. Justice Candy's Book on Khoti Tenure. 'All land in a khoti village, which is not dhára, must be khoti.' The khoti lands, which are cultivated by the khot himself, or by means of hired labourers, are called 'khoti khasgi,' and the rest is 'khoti nisbat,' which may be sublet to permanent tenants or to recent cultivators. This Court has in *The Collector of Ratnágiri* v. *Vyankatrav*[1] held that, in respect of trees growing in khoti khasgi or khoti nisbat lands, the khot was a proprietor, and not a mere farmer of the revenue. In that case, the dispute also related to trees cut down by the khots in the private khoti lands of a village included in the proclamation of Mr. Dunlop issued in 1823, and it was held that Government could not rescind or withdraw the grant made by it in this proclamation. Though the ruling in *Re Antaji Keshav Tambe*[2] was made in a criminal case, Mr. Justice Telang's judgment proceeds chiefly upon the nature of a khot's interest in khoti khasgi lands, which interest, he observes, was of a proprietary character, and entitled to the protection of the Dunlop proclamation, which made the trees then growing, and thereafter grown in private lands, the sole property of the person who grows them. The argument that the khot was not a proprietor of the soil was pressed in that case chiefly on the authority of *The Collector of Ratnágiri* v. *Raghunathrao*[3] and

(1) (1871) 8 Bom. H. C. Rep., 1(A. C. J.). (2) (1894) 18 Bom., 670.
(3) P. J. for 1875, 324.

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Nayardas v. *The Conservator of Forests*[1], but was disposed of by the observation that Westropp, C. J., distinctly refrained from expressing any opinion on the general rights of the khots, and Sir Charles Sargent preferred to follow in *The Collector of Ratnagiri* v. *Antaji Lakshman*[2] the ruling in *The Collector of Ratnagiri* v. *Vyankatrao*[3] noted above. These decisions cover the present dispute. The decision in *The Collector of Ratnagiri* v. *Antaji Lakshman* relates to the khot's alleged rights over forest land attached to the village. Forest lands were expressly excluded from the protection of the proclamation, and there is, therefore, no analogy between such forest lands and khoti khasgi lands in which the trees in dispute grow. The decisions in *Nayardas* v. *The Conservator of Forests*[4] and *Moro* v. *Narayan*[5] no doubt lay down broadly the position that the khots are not proprietors of the soil, but, as observed by Mr. Justice Telang in *Re Antaji Keshav Tambe*[6] and by Sargent, C. J., in *The Collector of Ratnágiri* v. *Antaji*[7], in regard to the ruling in *Nayardas* v. *The Conservator of Forests* (*supra*), that the decisions should not be carried beyond the point actually decided in these cases. On the whole, we feel satisfied that the District Judge was right in holding that the respondent-khots were entitled to claim a proprietary right in the trees growing in their khoti khasgi lands, and that the seigniorial rights of Government to teak trees were relinquished in 1823, and that relinquishment could not be rescinded by any subsequent proclamation of 1851 or notification of 1885.

We must, therefore, confirm the decrees and reject the appeals with costs.

Decree confirmed.

(1) (1879) 4 Bom., 264.
(2) (1888) 12 Bom., p. 519.
(3) (1871) 8 Bom. H. C.Rep., 1 (A. C. J.).
(4) (1879) 4 Bom., 264.
(5) (1887) 11 Bom., 680.
(6) (1893) 18 Bom., 670.
(7) (1888) 12 Bom., p. 511.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

SAGAJI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* NAMDEV (ORIGINAL DEFENDANT), RESPONDENT.* 1899. *January* 11.

Vendor and purchaser—Contract of sale—Non-payment of purchase-money—Suit for possession by vendee who has not paid the purchase-money—Remedy of vendor—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 47.

The plaintiffs owned certain land on which the defendant, with the plaintiffs' leave, built a house. Disputes arose between plaintiffs and defendant, and in February, 1893, the defendant obtained an order from the Mámlatdár in a possessory suit against the plaintiffs directing the plaintiffs to give up possession of the property to him. In August, 1893, an agreement was made between them, in pursuance of which the defendant executed a rent-note to the plaintiffs promising to give up the property to the plaintiffs at the end of four months on payment by the plaintiffs of Rs. 100. On the 25th November, 1896, the plaintiffs brought this suit for possession, alleging that the defendant refused to give up the property. The District Judge dismissed the suit, finding that the plaintiffs had not paid the Rs. 100, and holding that the defendant was, therefore, justified in putting an end to the contract contained in the rent-note. He further held that the suit was barred by limitation, not having been brought within three years from the date of the Mámlatdar's order of 28th February, 1893. See Limitation Act (XV of 1877), Sch. II, Art. 47.

Held (reversing the decree) that the evidence showed the transaction to be a sale of the property by the defendant to the plaintiffs for Rs. 100, possession being given to the plaintiffs under the lease for four months; that the sale was a completed transaction although the Rs. 100 had not been paid; and that the only remedy of the defendant was to sue for the amount.

Held, also, that the contract between the parties dissolved the order of the Mámlatdár in the possessory suit and rendered it unnecessary for the plaintiffs to sue to set it aside. The present suit, which was based on the contract of sale, was, therefore, not barred by article 47 of the Limitation Act.

SECOND appeal from the decision of C. H. Jopp, District Judge of Ahmednagar, reversing the decree of the Subordinate Judge of Nevása.

Suit for possession of a piece of land with a house standing upon it. The plaintiffs alleged that the land was their ancestral property, which the defendant and his father before him had occupied as tenants-at-will.

* Second Appeal, No. 273 of 1898.

1899.

SAGAJI v. NAMDEV.

It appeared that the defendant, with the plaintiffs' leave, built the house on the land in question. Disputes had arisen between them, and on the 28th February, 1893, the defendant had obtained an order from the Mámlatdár in a possessory suit for the possession of the house and the open space in front of it.

On the 30th August, 1893, the parties settled their disputes, the defendant then executing a rent-note to the plaintiffs, agreeing to give up possession of the property at the end of four months on payment by the plaintiffs of Rs. 100.

The plaintiffs brought this suit on the 25th November, 1896, alleging that the defendant had refused to give up the property as agreed upon.

The defendant pleaded (*inter alia*) that the property was his, and that the plaintiff had not paid him the Rs. 100, and that the rent-note had been executed by him under coercion. He further contended that the suit was barred by limitation, not having been brought within three years from the date of the Mámlatdár's order of the 28th February, 1893. See Limitation Act (XV of 1877), Sch. II, Art. 47.

The Subordinate Judge found that the land belonged to the plaintiffs, but the building belonged to the defendant, and that the defendant had agreed to part with the building for Rs. 100. He held that the plaintiffs were entitled to possession on payment of Rs. 100 to the defendant and passed a decree accordingly.

The defendant appealed. The Judge reversed the decree finding that the plaintiffs had not paid the Rs. 100, and holding that the contract of sale was, therefore, at an end. He also held that the suit was barred by limitation. In his judgment he said :—

"It is not seriously denied that the land in dispute originally belonged to the plaintiffs, and that it was occupied by the defendant with plaintiffs' licence, and that defendant, with plaintiffs' permission, built the house on the land. Plaintiffs have, therefore, proved that the ground in dispute with the site on which the house stands, but not the house, belonged to them. On 28th February, 1893, defendant obtained an order in a possessory suit before the Mámlatdár (Suit No. 2 of 1893) for possession of the house and the open space in front of it from the plaintiffs. On September 1st, 1893, plaintiff's claim for the rest of the land in dispute was dismissed by the Mámlatdar, plaintiff withdrawing his claim (Suit No. 50 of 1893). The present suit was instituted on November 25th, 1896, and defendant's pleader contends that the claim is time-barred, as plaintiffs did

not sue to set aside the Mamlatdar's order within three years. Plaintiff's pleader urges that the limitation is saved, as defendant passed a rent-note to plaintiffs for the house and property in dispute on August 30th, 1893, thus acknowledging plaintiffs' title to the whole of the property and rendering it unnecessary for plaintiffs to sue to set aside the orders of the Mámlatdár. Witnesses Nos. 36, 38 and 52 prove that this rent-note was executed by defendant in consequence of an agreement between him and plaintiffs that defendant should give up all his rights in the property, including the house, and should pass the rent-note in consideration of a sum of Rs. 99 or Rs. 100 to be paid by plaintiffs. I agree, however, with the Subordinate Judge that the evidence of plaintiffs' witnesses as to the fact of the payment of this sum by plaintiffs is too contradictory to be believed. It is not, therefore, proved that plaintiffs paid the sum of Rs. 99 or Rs. 100 to defendant according to the agreement between the parties when the rent-note was passed. Plaintiff has, therefore, refused to perform his part of the contract. The defendant was justified in putting an end to the contract, and the rent-note is void. The limitation is not, therefore, saved, as plaintiffs' pleader contends. Plaintiffs' claim is time-barred, and plaintiffs are not entitled to any relief in this suit."

Plaintiffs preferred a second appeal.

Narayan G. Chandavarkar for the appellants (plaintiffs).

Ráo Sáheb *Ghanasham N. Nadkarni* for the respondent (defendant).

PARSONS, J.:—The District Judge has not fully comprehended the effect of non-payment of purchase-money upon a contract of sale. In the present case, it is proved that the defendant sold the land to the plaintiffs for the sum of Rs. 100 and delivered possession thereof by passing a lease for it to the plaintiffs. The sale, therefore, was a completed transaction even though the 100 rupees were not paid, and the only remedy of the defendant was to sue for the amount. This contract between the parties dissolved the order of the Mámlatdár in the possessory suit and rendered it unnecessary for the plaintiffs to sue to set it aside. We cannot, therefore, hold that the present suit (based on the contract of sale and the lease) is time-barred by reason of not being brought within three years of the date of the said order of the Mámlatdár.

We, therefore, reverse the decree of the lower appellate Court and restore that of the Court of first instance.

Decree reversed.

CRIMINAL REFERENCE.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. January 12.

THE MUNICIPALITY OF BOMBAY *v.* AHMEDBHOY HABIBBHOY.*

Municipality—Bombay Municipal Act (Bom. Act III of 1888), Sec. 249—"Employed"—Meaning of the word—Discretion vested in the Municipal Commissioner.

The word "employed" in section 249 of the Bombay Municipal Act (Bom. Act III of 1888) refers to employment of any kind or for any length of time.

REFERENCE by Khán Bahádur P. H. Dastur, Third Presidency Magistrate, under section 432 of the Criminal Procedure Code (Act V of 1898).

The material portion of the reference was as follows:—

"Mr. Ahmedbhoy Habibbhoy is the mortgagee in possession of premises situate at Colába and used as godowns for the storage of cotton. Formerly there was a mill in this building, and it had some privies attached thereto for the use of the mill hands. Subsequently, however, when the premises were destroyed by fire and rebuilt as godowns, these privies were closed and have always remained so up to this day. On the 17th September, 1898, the Municipal Commissioner gave Mr. Ahmedbhoy a notice, under section 249 of the City of Bombay Municipal Act, to repair the existing privies so as to make them available for the use of persons employed upon the premises. This has not been done. And Mr. Ahmedbhoy is, therefore, charged under section 471 of the Municipal Act for failure to comply with the said notice.

"The evidence in the case shows that these buildings consist of two blocks, the new and the old, each containing several compartments let out to merchants separately for the storage of their cotton. No men are employed there permanently or for the whole day; but whenever cotton is to be moved in or out of

* Criminal Reference, No. 128 of 1898.

(1) Section 249 provides as follows:—"Where it appears to the Commissioner that any premises are intended to be used as a market, railway station, dock, wharf or other place of public resort or as a place in which persons exceeding twenty in number are employed in any manufacture, trade or business, or as workmen or labourers, the Commissioner may, by written notice, require the owner or occupier of the said premises to construct a sufficient number of water closets or latrines, or privies and urinals, for the separate use of each sex."

the godowns, some labourers and cartmen are engaged for the work and remain on the premises only as long as is necessary to finish their work. This naturally depends upon the quantity of cotton to be weighed and the number of bales to be delivered, but it does not seem that any batch of labourers has remained in the building longer than a few hours at a time.

* * * *

"The number of men employed in the godown is very fluctuating. Sometimes there are as many as 51, 68, 72, and 91 persons engaged in work, while on other days there are none at all, or only a very few—1, 6, 7 and 9.

"This being the case, the question is, whether the Municipal Commissioner can compel the owner of the premises to provide privy accommodation in the building?

"It is urged on behalf of the defence that the words 'are employed' in section 249 of the Municipal Act refer to a permanent and regular employment of the men and not to a temporary and occasional employment, as is admittedly the case here. I have, however, given my reasons in the judgment for holding the contrary opinion, and think that the section applies to all premises where more than twenty persons are engaged in any kind of work or for any length of time. If there is a discretion in the matter, it is with the Municipal Commissioner and not with this Court. Mr. Ahmedbhoy was, therefore, bound to comply with the notice.

"As, however, an authoritative decision in this matter is very desirable, I beg to refer for the opinion of the High Court the following point:—

"What is the meaning of the words 'are employed' appearing in the section?"

The reference was heard by a Division Bench (Parsons and Ranade, JJ.).

Branson for Ahmedbhoy Habibbhoy.

There was no appearance for the Municipality.

PARSONS, J.:—The Magistrate has asked of this Court the following question:—"What is the meaning of the words 'are employed' appearing in section 249 of the Bombay Municipal

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Act?" He thinks that the words refer to employment of any kind or for any length of time. I agree with him. It is the obvious meaning of these words in the section, the object of which was to empower the Municipal Commissioner to require privy accommodation to be provided for places in which persons exceeding twenty in number are employed as workmen or labourers. Neither the kind or duration of the employment is defined, and they, therefore, are immaterial. The number only of the employés is stated, and it alone will be the test of application. The Magistrate is, therefore, right in his opinion that the section applies to all premises. Where more than twenty persons are employed as workmen or labourers in any kind of work, or for any length of time, it is not for the Court to lay down nice distinctions as to the number of hours in the day or of days in the year which constitute employment necessitating privy accommodation. The Legislature has left that to the discretion of the Municipal Commissioner, and has empowered him, whenever he finds that persons exceeding twenty in number are employed as workmen or labourers on any premises, to require the owner thereof to provide necessary accommodation for them. At the same time, as the reference is rather vague and does not include what seems to be the real dispute in the case, I will express the further opinion that it would be a perfect answer to the requisition were the owner on its receipt to close the premises or to cease employing therein more than twenty workmen or labourers. The case has not been argued before us on behalf of the Municipality, and I reserve to myself the right of reconsideration, but, as at present advised, I think the owner would only be guilty of an offence under the section if after such requisition he failed to comply with it, and if more than twenty such persons were found to be employed without the required accommodation being provided for them. There are no materials before me to show how far this opinion applies to the present case.

RANADE, J.:—The point referred for the opinion of this Court relates to the construction of section 219 of the Bombay Act III of 1888, which empowers the Commissioner to require the owners of places in which persons exceeding twenty in number are employed as labourers or workmen in any manufacture, trade

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or business, to provide privies. The word "employed" used in this section is obviously used in its ordinary sense, *i.e.*, caused to be engaged in doing some service. There is nothing in the section which shows that the words were intended to signify the nature of the employment, as being from day to day, or occasional, or regular all the year round. The same word occurs in the two following sections in connection with buildings in which any person may be, or may be intended to be, employed in any manufacture, trade or business without any limit as to numbers. Actual employment is not essential in these two sections, and it is enough if the building is intended for such employment. In section 249 actual employment in numbers exceeding twenty is an essential condition to empower the Municipal Commissioner to require the owner to provide for the convenience of persons so employed. The real difficulty in the application of the section lies in the fact that the number of persons employed in the building in dispute varies at different periods from five to fifty. The section, however, gives a discretion on this point to the Commissioner, and is not, like section 248, imperative in its direction. That discretion has to be carefully exercised by him, but the discretion is his, and cannot be called in question in a court of law. Mr. Scott, in his edition of the Act, refers to the case of *Hargreaves* v. *Taylor*[1], when this last position was laid down in respect of a corresponding provision of the English Act. We think the Magistrate has correctly construed the section.

(1) (1863) 3 B. and S., 613.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

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January 17.

NARAYAN (ORIGINAL APPLICANT), APPELLANT, *v.* RASULKHAN (ORIGINAL OPPONENT), RESPONDENT.*

Limitation—Limitation Act (XV of 1877), *Sec.* 14—*Decree—Execution by Collector —Application to Collector to set aside sale—Civil Procedure Code (Act XIV of* 1882), *Secs.* 244, 310A, 311 *and* 320.

A decree passed against the applicant Narayan was transferred for execution to the Collector under section 320 of the Civil Procedure Code (Act XIV of 1882). On

* Second Appeal, No 513 of 1898.

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the 8th May, 1897, the Collector in execution sold certain property belonging to the applicant, which was purchased by the respondents. On the 17th May, 1897, the applicant applied to the Collector to set aside the sale on the ground of alleged irregularities, and the Collector having referred the matter to the Mámlatdar for report, forwarded the record to the Court on 30th July, 1897. On the 6th August, 1897, the applicant, fearing that he had not applied to the proper Court, applied to the Subordinate Judge to set aside the sale, framing his application both under section 310A and section 311 of the Civil Procedure Code (Act XIV of 1882). He contended that, under section 14 of the Limitation Act (XV of 1877) his application was not barred.

Held, that the application was barred by limitation. Under the rules made by the Government of Bombay under section 320 of the Civil Procedure Code (Act XIV of 1882) the Collector had no jurisdiction. There was, therefore, no *bonâ-fide* mistake of jurisdiction such as would justify the Court in excluding the time occupied in applying to the Collector from the period of limitation.

Under the rules made by the Local Government of the Bombay Presidency, a Collector has not the power of the Court, under section 311 of the Civil Procedure Code (Act XIV of 1882), to set aside a sale.

No second appeal lies from an order made under section 311 of the Civil Procedure Code (Act XIV of 1882).

SECOND appeal from the decision of Ráo Bahádur Chunilal Maneklal, First Class Subordinate Judge of Sátára with appellate powers, reversing the order of Ráo Sáheb Ramchandra Daji Nagarkar, Subordinate Judge of Wái.

On the 8th May, 1897, certain property belonging to the applicant Narayan was sold in execution of a decree against him by the Collector to whom the decree had been transferred for execution under section 320 of the Civil Procedure Code (Act XIV of 1882), and was purchased by the opponent Rasulkhan.

On the 17th May, the applicant applied to the Collector, under section 311 of the Civil Procedure Code, to set aside the sale, alleging that it had taken place at the chávdi instead of on the spot, and that the land had in consequence been sold at an undervalue. The Collector forwarded the application to the Mámlatdár for investigation, and on the 20th July, 1897, the Mámlatdár reported that the land had been sold at an undervalue. The Collector sent the proceedings to the Court, and they were filed on 30th July, 1897.

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Subsequently, *viz.*, on the 6th August, 1897, the applicant, fearing that his previous application had not been to the proper Court, applied to the Subordinate Judge to set aside the sale on the above grounds, and prayed that under section 14 of the Limitation Act (XV of 1877), the time occupied in prosecuting his application to the Collector should be deducted in computing the period of limitation for making the present application to the Court. He stated that he was ready and willing to pay the money due under the decree, and prayed for an order under section 310A of the Civil Procedure Code.

The opponent being served with a notice to show cause why the sale should not be set aside, denied that the land had been sold at an undervalue, pleaded limitation, and objected that no order could be passed under section 310A.

The Subordinate Judge set aside the sale.

On appeal, the Judge reversed the order, holding that the time spent in making the application to the Collector could not be deducted, and that therefore, the present application was barred by limitation.

In his judgment he said :—

'The judgment debtor, whose property has been sold at an undervalue, applied, quite in time, to the Collector to whom the execution proceedings had been transferred, under section 320 of the Code, to set aside the sale. That officer, instead of telling the applicant that he (applicant) should go to the Court, referred the application to the Mámlatdár for report, and this consumed nearly two months. The application made to the Court is clearly beyond time. The sale took place on 8th May and the application was made on 6th August. Section 14 of the Limitation Act does not, in my opinion, apply, because the Collector is not a Court within the meaning of that section."

The applicant preferred a second appeal.

Sadashiv R. Bakhle for appellant:—The application to the Collector was under section 311 of the Civil Procedure Code. That application should be treated as an application to the Court, although it was made to the wrong officer of the Court. The Collector is an officer of the Court. Ordinarily such applications are made to the Názir.

But, further, we contend that the application was rightly made to the Collector executing the decree—*Keshavdeo* v. *Radhe*

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Prasad[1]. This application is made under both section 310A and section 311 of the Code.

Kaji Kabiruddin with *Gangaram B. Rele* for the respondent (opponent):—The Collector merely executes the decree in his capacity as a ministerial officer of the Court. The Collector himself is not a Court—*Ganpatram* v. *Isaac Adamji*[2]; *Bai Amthi* v. *Madhav*[3]; *Mahadaji* v. *Hari*[4]; *Lallu Triham* v. *Bhavlu Mithia*[5].

Further, the reliefs claimed under the application to the Collector, under section 311, were different from that now asked for under section 310A. Therefore, the applicant cannot get the benefit of section 14 of the Limitation Act.

PARSONS, J.:—We see no reason to doubt the correctness of the decisions of this Court in the cases of *Ganpatram* v. *Isaac Adamji*[6] and *Bai Amthi* v. *Madhav*[7]. The case of *Keshabdeo* v. *Radhe Prasad*[8] is cited as being opposed to these decisions, but we cannot say whether it is so or not, as we have not before us the rules framed by the Local Government of the North-Western Provinces under section 320 of the Code of Civil Procedure. It is sufficient for us to say that the rules made by the Local Government of this Presidency do not confer on the Collector the power of the Court under section 311, and that section 320 by itself confers no such power. Possibly an application made to the Collector and by him forwarded on to the Court might be held to have been made to an officer of the Court, so that limitation might be counted from the date of presentation to the Collector, but upon that point it is unnecessary to pronounce a decision since the appellant has in these proceedings relied, not upon the application he made to the Collector, but upon the one that he made to the Court on the 6th August, which is based on other grounds and contains additional prayers of relief. We confirm the order of the lower appellate Court with costs.

RANADE, J.:—Taking the application of 6th August, 1897, made by the appellant to the Wái Court as an application under section 311, it is plain that no second appeal lies from the order

(1) (1888) 11 All., 91.
(2) (1890) 15 Bom., 322.
(3) (1891) 15 Bom., 691.
(4) (1883) 7 Bom., 332.
(5) (1897) 11 Bom., 478.
(6) (1890) 15 Bom., 322.
(7) (1891) 15 Bom., 691.
(8) (1888) 11 All., 91.

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of the lower appellate Court. It was, however, contended that the application contained also a prayer under section 310A, and that in such applications an appeal lies from orders passed thereon as from an order under section 244. On reading the application in the present case, however, it is found that there was only an offer to pay, but no actual deposit of purchase-money, and, further, as the prayer to set aside the sale was joined with the other prayer, such an application cannot be entertained under the proviso to section 310A. No second appeal lay, therefore, in this case.

On the merits also it is quite clear that the application of 6th August, 1897, was made more than thirty days after the sale took place. The applicant's pleader sought to bring the application within time by reason of the prior application made to the Collector on 17th May, 1897, within nine days from the auction sale. He contended that such applications under section 311 can only be made to the Collector, and cited *Keshabdeo* v. *Radhe Prasad*[1] as an authority for this position. That decision, as also the cases referred to therein, obviously have reference to the rules made by the North-Western Provinces Government under section 320. The rules made by the Local Government here under the same section give no power to the Collector to dispose of such applications, and this Court has decided in the cases of *Ganpatram* v. *Isaac Adamji*[2] and *Bai Amthi* v. *Madhav*[3] that the Collector has no jurisdiction. Besides, the application of 6th August was not a continuation of the application to the Collector. There was, therefore, no *bonâ-fide* mistake of jurisdiction which alone might, under certain circumstances, be pleaded under the Limitation Act as an excuse for excluding the time so taken up from being reckoned. For these reasons, the order passed by the lower appellate Court seems to be correct, and we dismiss the appeal.

Order confirmed.

(1) (1884) 11 All., 94. (2) (1890) 15 Bom., 322.
(3) (1891) 15 Bom., 691.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *January* 18.

BHAVANISHANKAR (ORIGINAL APPLICANT), APPELLANT, *v.* NARANSHANKAR (ORIGINAL OPPONENT), RESPONDENT.*

Res judicata—Suit by C for mesne profits as devisee of land under will of A—Will held valid and C's claim allowed—Application by C as legal representative of A for execution of decree obtained by A—Question of validity of will again raised—Civil Procedure Code (Act XIV of 1882), Sec. 244.

A obtained a decree against B for possession of certain land, and then died. Thereupon C applied for execution of the decree as A's legal representative, relying upon a will made by A in his favour. At the same time, C filed a suit to recover Rs. 140 as mesne profits of the land. The execution proceedings were stayed till after the disposal of the suit for mesne profits. In this suit, B contended that the will in question was not executed by A, and that A was not of sound disposing mind at the time of the alleged execution of the will. The Subordinate Judge found on both these points against B and passed a decree for mesne profits. This decree was upheld, on appeal, by the District Judge.

After the decision of this suit, the Subordinate Judge took up C's application for execution of the original decree obtained by A. This application was resisted by B on the same grounds on which he had defended the suit for mesne profits. He impeached the validity of the will on the grounds of non-execution by, and unsoundness of mind of, the testator. The Subordinate Judge held that the matter was *res judicata*; he, therefore, overruled this objection, and ordered execution to issue. The District Judge held that as the suit for mesne profits was in the nature of a Small Cause suit, in which there was no second appeal, the decision passed in that suit did not operate as *res judicata* in the present execution proceedings. He, therefore, reversed the Subordinate Judge's order and remanded the case for a fresh decision.

Held, reversing the remand order, that the question whether C was entitled to execute the decree as A's representative fell within the last clause of section 244 of the Code of Civil Procedure (Act XIV of 1882). The Subordinate Judge, who had raised an issue as to the validity of the will relied upon by C in the suit for mesne profits, was entitled to act upon his determination of that issue in the execution proceedings.

SECOND appeal from the decision of E. H. Moscardi, District Judge of Surat.

One Bai Parvati obtained a decree for possession of certain land. The decree did not award mesne profits from the date of the suit till delivery of possession.

*Second Appeal, No. 528 of 1898.

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Bai Parvati died shortly after this decree, leaving a will by which she bequeathed to one Bhavanishankar Jekrishna all her rights under the decree.

On the strength of this will, Bhavanishankar filed a *darkhást* for the execution of the decree, and at the same time filed a suit to recover Rs. 110 on account of mesne profits.

The *darkhást* and the suit were filed on the same day—1st March, 1897.

The execution proceedings were stayed till after the suit for mesne profits should be decided.

In this suit the chief questions at issue between the parties were (1) whether Bai Parvati had executed the will relied upon by the plaintiff, and (2) whether she was of sound disposing mind at the time of execution of the will.

The Subordinate Judge found both these issues in Bhavanishankar's favour, and awarded him mesne profits as claimed. This decree was upheld, on appeal, by the District Judge.

After this decision, the application for execution came on before the Subordinate Judge.

The judgment-debtors resisted the *darkhást* on the same grounds as those on which they had already defended the suit for mesne profits; as before, contending that Bai Parvati had not duly executed the will, and that she was not of sound disposing mind at the time of execution.

The Subordinate Judge held that on both these points the decision in the suit for mesne profits operated as *res judicata*. He, therefore, granted the application and ordered execution to proceed.

On appeal the District Judge held that the matter was not *res judicata*. He, therefore, reversed the Subordinate Judge's order and remanded the *darkhást* for a fresh decision on the merits. His reasons were as follows:—

"In *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (I. L. R., 23 Calcutta, 885) it was decided that no second appeal lies from a suit for mesne profits where the value of the subject matter in dispute is less than Rs. 500, because

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such a suit is cognizable by a Court of Small Causes, and in *Govind bin Lakshmanshet Anjolkar* v. *Dhondbarav bin Ganbarav Tambye* (I. L. R., 15 Bom., 101) it was held that decisions in previous suits, which were in the nature of Small Cause suits and in which there was no right of second appeal did not operate as *res judicata* in cases in which a second appeal lay. In this case a second appeal lies, and consequently the findings in the suit for mesne profits are not *res judicata* in the present *darkhast*.'

Against this decision Bhavanishankar appealed to the High Court.

Ganpat S. Rao for appellant.

Manekshah Jehanjirshah for respondent.

PARSONS, J.—We think that the point at issue falls within the words of the last clause of section 211 "determined by a separate suit" and that the Subordinate Judge, who had stayed the execution proceedings pending a suit between the same parties in which an issue had been raised as to the validity of the will under which the applicant claimed, and which the opponents disputed on the ground of non-execution by, and unsoundness of mind of, the testatrix, was entitled to act upon his determination of that issue in the execution proceedings. It follows, therefore, that the District Judge, who himself confirmed, on appeal, the finding as to the validity of the will, should not have reversed the order and remanded the *darkhast* for a fresh decision. He could and should have acted in the execution proceedings upon the determination he had come to upon the same point in the suit.

We reverse the order made by the lower appellate Court and restore that of the Court of first instance, with costs in this and the lower appellate Court on the opponents.

Order reversed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

LASTINGS (ORIGINAL PLAINTIFF), APPELLANT, *v.* GONSALVES AND OTHERS (ORIGINAL DEFENDANTS, NOS. 1 3, 5, 6, 10-22 AND 7 9), RESPONDENTS.* 1899. *January* 18.

Religion—Native Christians—Change of religion—Law applicable to convert—Succession—Inheritance.

Where, in consequence of the conversion of a person from one form of religion to another, the question arises as to the law to be applied to such person, that question is to be determined not by ascertaining the law which was applicable to such person prior to the conversion, but by ascertaining the law or custom of the class to which such person attached himself after conversion and by which he preferred that his succession should be governed.

APPEAL from the decision of Ráo Bahádur G. V. Limaye, First Class Subordinate Judge of Belgaum.

In this suit the plaintiff (Letitia Lastings), who was a member of a Native Christian family resident at Belgaum, claimed a one-third share of certain bungalows situate at Belgaum, which had belonged to her father, D. F. Gonsalves, who died in 1855. She alleged that the property had been left undisposed of by his will, and she claimed that, as heirs of her father, she and her two brothers (defendants Nos. 1 and 2) were entitled in equal shares. The plaint stated the cause of action to have arisen in 1893, when the plaintiff first became aware of her rights and demanded her share, and it was apparently assumed that the law applicable to the case was the Indian Succession Act (X of 1865).

At the hearing, the Subordinate Judge framed issues of which the fifth was as follows:—

"5. Is the plaintiff entitled to any and what share in the properties in dispute?"

No evidence was given of the status of the plaintiff and her family, and on this issue the Subordinate Judge accordingly dismissed the suit, holding that it lay upon the plaintiff to show by what law her family was governed at the time of her father's death in 1855, and under which she claimed a share in his estate. He was of opinion that as it certainly was not the Succession Act (X of 1865), which was not passed until 1865, the presumption

*Appeal, No. 56 of 1898.

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was that the law applicable was the law applicable to the family before conversion to Christianity. As there was no evidence upon this point, he dismissed the plaintiff's claim. In his judgment he said :—

'Issue 5. The plaintiff, who is admittedly a descendant of a Native Christian family, claims as one of the heirs of her deceased father, D. F. Gonsalves, a certain share in his property, alleging that the same is intestate, inasmuch as the disposition made by the deceased by his will is confined to the income of the property and does not extend to the property itself: *vide* Exhibit 82. Assuming that her father died intestate, the first question, which is essential to the determination of her right of succession, is, by what law the family was governed in 1857. The parties presumably appear to have been under a misconception on this point since they relied solely on the Indian Succession Act in support of their respective contentions. That Act certainly is not applicable, as the succession opened long before its enactment. The pleadings do not show what the respective allegations of the parties are as to the law applicable to the family of the deceased in regard to succession; and the plaintiff made no attempt to show that the family is governed by any particular law or usage entitling her to a share along with her brothers. Her pleader only contented himself by stating that the English law was not applicable to the case. On the other hand, it is not the defendants' contention that the case is governed by that law. The presumption, then, is that the law applicable is the law which was applicable before the conversion to Christianity. It is to be regretted that there are no materials in the case, like those in the Thana Case (see Printed Judgments for 1894, p. 328), which was originally decided by me, for determining from what caste or religion the conversion took place. Hence it is impossible to arrive at a conclusion on the question above alluded to. I, therefore, feel constrained to hold that the plaintiff has failed to show that she is entitled to any share in her deceased father's estate. I find on the 5th issue in the negative absolutely. This finding renders it unnecessary to find on the remaining issues. I reject the claim with costs."

The plaintiff appealed.

Sadashiv R. Bakhle for the appellant (plaintiff):—No issue was raised as to the law applicable to the plaintiff's family, and, therefore, no evidence was given on the point. He referred to *Bai Baiji* v. *Bai Santok*[1]; *Barlow* v. *Orde*[2].

Ratanji R. Desai for respondent (defendant No. 2):—The family is Native Christian and, therefore, English law is applicable—*Lopes* v. *Lopes*[3]. The Native Christians at Belgaum were originally

(1) (1894) 20 Bom., 53. (2) (1870) 13 M. I. A., 277.
(3) (1808) 5 Bom. H. C. Rep., 172.

Madras Hindus—"Belgaum Gazetteer," pp. 226-227. Possibly the plaintiff's father was a Portuguese. Either Hindu law or English law must be applied, and in neither case can the plaintiff succeed. The decree of the Judge is, therefore, substantially correct.

Kola with *B. B. Boyce*, for respondents Nos. 6 and 7 (defendants Nos. 10 and 21):—We purchased portions of the property from defendant No. 2, and support his case.

PARSONS, J.:—The Subordinate Judge dismissed this suit upon a preliminary point, which was not specifically raised by any issue, and upon which, therefore, no evidence was given by the parties. Moreover, the reason given for the dismissal is wrong. The parties are Native Christians. The presumption drawn by the Subordinate Judge was that the law applicable to them was the law by which their family was governed before its conversion to Christianity, and because it was not shown from what religion it was converted to Christianity, the Subordinate Judge considered this to be fatal to the plaintiff's case, which he accordingly dismissed. We think that this is a clear error. The law prior to conversion is a point on which it might not be necessary to give any evidence at all, because as laid down in *Bai Baiji* v. *Bai Santok* [1], citing *Abraham* v. *Abraham* [2], the convert may, by his course of conduct after conversion, show by what law he intended to be governed as to these matters.

The *ratio decidendi* is laid down in *Barlow* v. *Orde* [3], where their Lordships of the Privy Council say:

"The construction and effect of the will, therefore, must depend on the law of the domicile, if that can be ascertained. At the time of the Colonel's death there was no *lex loci* of the province in which he was domiciled, and the law applicable to the succession of any individual depended on his personal *status*, which again mainly depended on his religion. Thus the succession of a Hindu would, as a general rule, fall to be regulated by Hindu law, and of a Mahomedan by Mahomedan law, and of an East Indian Christian by English law; but in every case, for the purpose of determining the *status personalis*, regard was to be had to the mode of life and habits of the individual, and to the usages of the class or family to which he belonged. If no specific rule could be ascertained to be

(1) (1894) 20 Bom., 53. (2) (1863) 9 M. I. A., 195.
(3) (1870) 13 M. I. A., 277.

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HASTINGS v. GONSALVES.

applicable to the case, then the Judges administering justice in the province were to act 'according to justice, equity, and good conscience.'"

This, no doubt, was said as to a particular province, but the principle holds good equally as well in respect of this part of India: see *Jethibai* v. *Louis Manoel*(1).

In the present case no proper opportunity was given to the parties to adduce any evidence on these points, nor has the Judge considered the evidence that there is on the record,—for instance, there is the will (Exhibit 62) made by the deceased, the language, wording and nature of which cannot be ignored. We, therefore, reverse his decree and remand the case for a fresh inquiry and decision after raising the proper issues and taking evidence. Costs to be costs in the cause.

RANADE, J.:—This case has not been satisfactorily disposed of in the Court below. The principal parties to the suit are non-European Christians, the claim being brought by a sister against her two brothers and persons claiming under them for her one-third share of her father's property. The plaint stated that the plaintiff's father had made a will in 1852, and that he died in 1855. This will disposed of the rents, but not of the properties themselves. Plaintiff's mother kept back this will, and, before her death in 1886, made a fresh will inconsistent with her husband's will, and the defendants Nos 3 and 4 took out probate of this second will, and all the defendants were in possession of the whole estate under this second will. The claim for a third share was made apparently under Act X of 1865, which provides that daughters and sons shall share equally in intestate succession. Defendant No 1 did not object to the claim, but defendant No. 2 contended that his father's will disposed not only of the rents, but also gave full power to his widow to dispose by will the estate left by him, and that the second will disposed of the estate accordingly.

The first question in the case was as to the status of the parties, and the law which governed the devolution of property in intestate succession. The lower Court laid down no issue on this point. It only remarked that neither English law nor Act X of 1865 was applicable to the case, and that the law which applied to the parties before their conversion should govern the dispute.

(1) (1894) 19 Bom., 680.

As plaintiff failed to show to what caste or religion the family belonged before conversion, the lower Court dismissed the suit.

The appellant's pleader very properly took exception to this summary procedure which disposed of the case on a point on which no issue had been raised. The lower Court, moreover, was in error in the view it has expressed about the law which governed such cases. There is no doubt that Act X of 1865 does not govern the case, as the appellant's father died in 1855, and section 331 expressly comes in the way of all retrospective extension of the Act. As the parties are Native Christians residing at Belgaum outside the Town and Island of Bombay, the ruling in *Lopes* v. *Lopes*[1], which applied English law to Portuguese inhabitants of Bombay, does not govern this case If they are East Indian Christians the English law will govern their succession disputes—*Barlow* v *Orde*[2]. If they are converted Native Christians, then they must be governed by the law to which they and their family have attached themselves. The rules of Hindu law, if they were Hindu converts, will not apply as a matter of course. The convert may renounce the law by which he was bound, or, if he think fit, he may abide by the old law. His course of conduct after conversion by attaching himself to a class which has a personal law of its own, or by personally observing such usage or custom, must determine the question of what law he has preferred to attach himself to. This was the principle laid down in *Abraham* v. *Abraham*[3] and has been followed in this Court in a series of decisions—*Jalbhai* v. *Louis Manoel*[4]; *Bai Baiji* v. *Bai Santok*[5]. It is thus clear that the question at issue does not depend upon the consideration of the law prior to conversion, but on the law or custom of the class to which the parties attached themselves after conversion, and by which they preferred that their succession should be governed. This case must, therefore, be remanded back to the lower Court, which should frame an express issue on this point, and after receiving evidence on the same decide the case on the merits.

Decree reversed and case remanded.

(1) (1868) 5 Bom. H. C. Rep., 172.
(2) (1870) 13 Cal. W. R., 41 (P. C.)
(3) (1863) 9 M. I. A., 195.
(4) (1894) 19 Bom., 680.
(5) (1894) 20 Bom., 53.

PRIVY COUNCIL.

P. C.*
1898.
November 15,
December 10.

BHAGWANDAS MITHARAM (DEFENDANT No. 2), APPELLANT, AND RIVETT-CARNAC (PLAINTIFF No. 2), RESPONDENT.

On appeal from the High Court at Bombay.

Partnership—Death of partner—Subsequent recovery of assets by surviving partner—Suit by administrator of deceased partner against surviving partner for recovered assets—Suit for partnership account—Limitation Act (XV of 1877), Secs. 7 and 17.

In 1889, one Hemabai, a widow and partner in a firm carrying on business in partnership with Goculdas and Bhagwandas (defendants Nos. 1 and 2) in Sind and at Behrin in the Persian Gulf, died, and the partnership was then dissolved. She had no children, but it was alleged that she had adopted one Purshotam, the brother of the second defendant. On the 13th February, 1890, the guardian of one Kissondas, a minor (her husband's nephew), applied to the High Court of Bombay for letters of administration to her estate, alleging that Kissondas was her heir and next of kin. A caveat was filed by her father and others, in which they denied that Kissondas was her heir, and alleged that Purshotam had performed her funeral ceremonies. The matter came on as a suit on the 19th February, 1894, when an order was made without prejudice to any of the questions raised by the issues, dismissing the application and ordering letters of administration to Hemabai's estate to issue to the Administrator General of Bombay. Letters of administration were accordingly granted to him on the 30th March, 1894.

In the meantime, however, *viz.*, on the 12th April, 1893, Bhagwandas (defendant No. 2) had filed three suits in the High Court of Bombay, in the name of himself and Goculdas (defendant No. 1), as surviving partners of Hemabai's firm, to recover certain debts due to that firm. Disputes subsequently arose between Bhagwandas and Goculdas, and, by a consent order of the 22nd July, 1893, it was ordered that any money recovered in the said three suits should be paid over to a receiver (defendant No. 3) to be held by him until further order. On the 1st August, 1893, consent decrees were passed in the above three suits for a total sum of Rs. 28,335, which was forthwith handed over to the receiver.

On the 22nd April, 1894, this suit was filed by the Administrator General of Bombay as administrator of Hemabai appointed as above stated. He claimed to recover the whole sum paid to the receiver, alleging that the first and second defendants as her partners were largely indebted to the firm, and that the money really belonged to her estate. He prayed that the receiver might be directed to pay over the money to him, and, if necessary, the partnership accounts should be taken. The second defendant (*inter alia*) pleaded that the suit was one for

* Present: LORDS ASHBOURNE, HOBHOUSE, and MACNAGHTEN, and SIR R. COUCH.

partnership accounts, and as such was barred by limitation, and also that the High Court of Bombay had no jurisdiction to try it.

Held, affirming the decision of the High Court of Bombay, that this suit was not barred by time; the latter Court having decided on the ground that the Administrator General having been the only person capable of suing within the meaning of section 17 of Act XV of 1877 (Limitation) that section operated to allow the period of article 106 to be computed from the issue of administration of this estate.

A decree was made for a general partnership account to establish what was due to the estate of the deceased in respect of her share in the partnership, and of any money of hers employed in the business continued by the survivors.

APPEAL from a decree (13th August, 1895) of the appellate High Court, varying a decree (19th November, 1891) of the High Court in the Original Jurisdiction.

The proceedings in this suit prior to this appeal are reported in *Rivett-Carnac* v. *Goculdas Sobhan Mull, Bhugwandas Mitharam and Limji Navroji Banaji* [1], where the judgments of the Court of Original Jurisdiction and of the appellate High Court are given at length. And there the facts of the case are all stated, as well as in the judgment on this appeal.

This suit was brought on the 22nd April, 1894, by the Administrator General of Bombay, who obtained, on the 30th March, 1894, administration of the estate of a widow, Hemabai, deceased on the 1st September, 1889, then being in partnership with the first and second defendants in a business carried on at Karáchi and Behrin in the Persian Gulf. The claim was for Rs. 28,335 in the hands of the third defendant, the receiver appointed to have charge of that money, which had been paid in discharge of decrees obtained by the first and second, as surviving partners, against debtors to the firm in which the deceased had been a partner, that firm having been continued by the survivors.

The plaint stated that the whole of the capital was supplied by Hemabai's late husband, who died in 1884, leaving her as his heiress; and alleged that the first defendant was a working partner, with whom Hemabai carried on the business, and that they had admitted the second defendant Bhagwandas, who also supplied no capital: that, at her death, the first and second were each in-

(1) (1895) 20 Bom., 15.

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debted to the partnership, and had nothing to receive therefrom, as would appear on taking the accounts, if found necessary to be taken.

The prayer for relief was (*a*) 'that it may be declared that the said moneys in the hands of the receiver belong to the estate of Hemabai and that the plaintiff is entitled to the same; (*b*) that, if necessary for the purposes of this suit, the account of the partnership, between Hemabai and the first and second defendants, may be taken."

Bhagwandas Mitharam alone defended, alleging that the accounts of the partnership had never been taken, and that the right to an account was now barred under article 106 of Act XV of 1877. The money now claimed would have come in as an outstanding debt to the partners. He also counter-claimed a share in Rs. 5,292, a debt due to the firm, but paid by the debtor to the plaintiff.

Goculdas assented to the share of Hemabai being taken by her representative.

The principal questions raised at first, and again on this appeal, were, (1) whether after the dissolution of a firm by the death of a partner, and the continuance of its business by the survivors, assets consisting of debts due to the late firm could, when realized by the survivors, be apportioned to the representative of the deceased, as belonging to her estate, without an account being taken of the partnership; (2) whether such an account having been a necessity, and being now barred by article 106, as the defence insisted, the suit must be dismissed.

The first Court (Candy, J.) was of opinion that the claim to a general account of the partnership business was barred by time; but that, without it, the estate of the deceased was entitled to a share of the assets in charge of the receiver proportionate to what had been her share in the business, and to a similar share in the sum paid to the plaintiff in his character as her administrator.

From this decree the Administrator General appealed, alleging, as before, that Hemabai's estate was entitled to the whole of those

assets. The defendant thereupon filed cross-objections to the effect that the suit ought to have been dismissed entirely.

The appellate High Court (Farran, C. J., and Starling, J.) decided that a general account was not barred by time. Inasmuch as the Administrator General had been the only person not under a disability to sue, or the only person, in the words of section 17, "capable of suing," the time of limitation must be reckoned from when administration of the estate was delivered to him, who represented the interests of the minor heir, against whom no time had run.

The grant of leave to sue under clause 12 of the Letters Patent was sufficient to give the jurisdiction which had been exercised, the money sought to be awarded being in the receiver's hands. The technical objections failed, and there was no defence upon the merits that could possibly stand. The High Court, therefore, varied the decree of the Court below and decreed in the terms of (*a*) and (*b*) in the plaint. The effect of the appellate Court's decree was that the plaintiff was entitled to the sum that he had already received.

The defendant No. 2 appealed.

Crackanthorpe, Q. C., and *J. D. Mayne*, for the appellant:—The suit was such as to necessarily involve that no decree for the division of the assets among the parties could be made without the general accounts of the partnership having been taken. The original Court was wrong in ordering distribution of the shares in the assets while the state of those accounts was neither admitted nor ascertained. The liabilities of the firm had to be considered. So far as to the necessity of an account. But in regard to article 106, and section 17 of the Limitation Act, there had been no solution of the question whether an account was not now barred by time. It had not been determined whether there had not been a legal representative of Hemabai all the while.

Jardine, Q. C., and *J. H. A. Branson* for the respondent:—The decree of the appellate High Court was substantially right and the appeal should be dismissed. But the Administrator General did not oppose the taking the account which in effect was decreed. It was insisted, however, that it would appear, as the fact was,

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that all the existing capital of the firm belonged to Hemabai's estate.

Counsel for the appellant did not reply. Their Lordships' judgment was afterwards, on 10th December, read by

LORD MACNAGHTEN.—It appears that one Hemanmal carried on business with the defendant Goculdas in Sind and in the Persian Gulf until his death in 1881. He left a widow named Hemabai but no issue. After his death the business was continued by Goculdas and Hemabai. On the 7th of August, 1881, the appellant Bhagwandas was admitted into the firm, and a partnership agreement of that date was made between the three—Hemabai, Goculdas and Bhagwandas. Hemabai was admittedly the moneyed partner if not the owner of the business. She died on the 1st of September, 1889. On her death the partnership was dissolved. But the affairs of the partnership were not wound up, and apparently her moneys were retained by the surviving partners and employed in the business.

In 1890 an application for letters of administration was made on behalf of one Kissondas, then about ten years old, claiming to be the heir. But the application was resisted by Bhagwandas, who alleged that Kissondas was not heir and alleged also that Hemabai left a will. The case came before the Court. No will was forthcoming, nor was it suggested then that there was a nearer heir. The Court, however, directed that the Administrator General should take out administration without prejudice to any question, and made provision for the costs of all parties.

In the meantime, Goculdas and Bhagwandas as surviving partners took proceedings in Bombay to recover certain debts, or the balance of certain debts, owing to the business. Ultimately the amount claimed, which came to about Rs. 28,000, was paid to a receiver appointed by the Court. On the 30th of March, 1894, the Administrator General took out representation to Hemabai, and in April following he brought this suit against Goculdas and Bhagwandas claiming (*a*) to have the whole amount in the receiver's hands paid to him in his representative character, alleging that Goculdas and Bhagwandas had nothing to receive, but were in fact debtors to the partnership and (*b*) if necessary to have the ac-

counts of the partnership taken. He also asked for such further relief as the circumstances might require. Goculdas did not resist the plaintiff's claim. Bhagwandas set up every possible defence. He submitted that the Court in Bombay had no jurisdiction in the matter. He relied on the law of limitation and he alleged, what was perfectly true, that the accounts of the partnership had never been taken. By a supplemental defence he insisted that the plaintiff was bound to account to Goculdas and himself for their shares in a sum of Rs. 5,292 which admittedly had been recovered from a debtor to the partnership by the plaintiff himself since the institution of the suit.

Candy, J., before whom the case came in the first instance, gave effect, in a great measure, to the points raised by way of defence on behalf of Bhagwandas. He held that the Court had jurisdiction only in regard to the assets recovered in Bombay. He also held that the plaintiff's right to a general account was barred by limitation, and in the result he ordered the costs of all parties to be paid out of the fund in the hands of the receiver, and divided the balance of that fund, as well as the moneys recovered by the plaintiff, between the plaintiff and Bhagwandas, giving to the latter the proportionate share to which he would have been entitled under the partnership agreement if the assets in dispute had been profits of the partnership business.

The learned Judges of the High Court on appeal held that the jurisdiction of the Court was not limited to the assets recovered in Bombay. It was not disputed at the bar that the judgment of the Appeal Court was right so far. Then they held that the suit was not barred by limitation. They considered—and their Lordships agree in their view—that on the materials before the Court it must be taken that the Administrator General is suing on behalf of the infant heir. As far as the evidence goes, the opposition on the part of Bhagwandas in the probate suit was a mere pretence put forward in order to defeat or delay the infant's right to an account against Hemabai's surviving partners. The Appeal Court ordered Bhagwandas to pay all the costs, and adjudged to the plaintiff the whole fund in the hands of the receiver.

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Although their Lordships agree with the Appeal Court in the main, they are unable to find sufficient evidence to justify the decree in the form in which it was drawn up. In his pleadings Bhagwandas insisted that an order in the plaintiff's favour ought not to be made without taking the accounts. And that was his principal contention before their Lordships. Nor does it appear that he ever receded from that position. To a certain extent, indeed, it was common ground that the accounts must be taken. One of the plaintiff's reasons, in his memorandum of appeal from the judgment of the lower Court was "that the plaintiff was entitled to insist on the partnership account being taken before the second defendant"—that is Bhagwandas—"could be allowed any share in the moneys recovered by the plaintiff." And it would appear, from the language of the judgment delivered by the Chief Justice, that it was intended that provision should be made for taking the accounts, unless they were waived by Bhagwandas. His conclusion was that the decree of the lower Court "must be varied by making a decree in terms of paragraphs (*a*) and (*b*) of the plaint." Now paragraph (*b*) asked for an account, while paragraph (*a*) asked for payment without an account. There is nothing to show how it was that the decree came to be drawn up in its present form. Probably both parties are to blame for the error and for the expense which has resulted from it.

It seems to their Lordships that the proper order will be to direct an account to be taken of the partnership dealings and transactions, to enquire what was due to the estate of Hemabai in respect of her share at the time of her death, and how the amount due to her estate has been dealt with, and, if it appears that such amount, or any part thereof, has been employed in the business continued by the surviving partners, to direct the accounts of such business to be taken. Further consideration and costs must be reserved.

This order will enable the Administrator General to make such claim as he may be advised in respect of interest or profits since Hemabai's death. Bhagwandas must pay the plaintiff's costs up to and including the hearing by the lower Court. Each party must bear his own costs here and in the Appeal Court.

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Their Lordships will, therefore, humbly advise Her Majesty that an order be made to that effect.

Appeal allowed. Decree amended.

Solicitors for the appellant:—Messrs. *Lattey and Hart.*

Solicitors for the respondent:—Messrs. *Payne and Lattey.*

ORIGINAL CIVIL.

Before Mr. Justice Tyabji; and on appeal before Mr. Justice Candy and Mr. Justice Starling.

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March 3, 7.

RALLI BROTHERS, PLAINTIFFS, *v.* CHABILDAS LALLUBHAI AND OTHERS, DEFENDANTS.*

Ship—Charter-party—Bill of lading—Freight—Rate of freight in charter-party—Contract by sub-charterer with shipper for freight at lower rate—Refusal by captain to sign bills of lading at lower rate than rate in charter-party—Payment by shipper of difference under protest.

On 3rd March, 1898, Karamsi Dharsi & Co., a firm of freight jobbers in Bombay, contracted to provide the plaintiffs with freight for 3,000 tons of cargo to Liverpool at 16*s.* 6*d.* per ton in a steamer to be subsequently named, and on the same day handed to the plaintiffs three shipping orders addressed to the captain of the ship, the name of which was to be afterwards inserted. In these shipping orders the higher and lower rate clause was as follows:—"Bill of lading if required at lower or higher rate, difference payable here as customary." This clause the plaintiffs struck out from each of the shipping orders according to their usual practice. On 11th May, 1898, the defendants chartered the steamship "Paddington" of which they were also the owners' agents in Bombay, and on the 12th May assigned a half share of their interest under the charter-party to Karamsi Dharsi & Co. By the charter-party a full and complete cargo was to be loaded, and the freight was to be £1-10 per ton. The captain, however, was authorized to sign clean bills of lading at any rate of freight required by the charterers without prejudice to the charter-party, but at not less than the chartered rate, unless the difference was paid in cash before sailing.

Karamsi Dharsi & Co. having thus sub-chartered the "Paddington" declared that steamer to the plaintiffs for 2,747 tons of cargo under their contract of the 3rd March, 1898, and the name of the steamer was then entered in the shipping orders for that amount of cargo. The plaintiffs thereupon commenced to load a cargo of wheat. By the 21st June, 2,100 tons had been put on board; mate's receipts were given to the plaintiffs and bills of lading were prepared by them, stating the rate of freight to be 16*s.* 6*d.* per ton as per the shipping orders, and were

* Suit No. 339 of 1898; Appeal No. 1003.

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presented for signature to the captain. He refused to sign them unless the difference between 16*s.* 6*d.* and the chartered rate, *viz.*, £1-10, was paid to him as provided in the charter-party. The plaintiffs thereupon refused to ship any more cargo and demanded the return of the cargo already shipped on board the "Paddington." On the 24th June the "Paddington" sailed from Bombay, the captain having previously authorized the defendants to sign bills of lading for him after his departure provided they were in accordance with the charter-party. After some delay the plaintiffs on the 29th June accepted bills of lading for the 2,100 tons at £1-10 and paid under protest the difference between that rate and their contract rate (16*s.* 6*d.*) and certain other sums for which the defendants as agents of the owners claimed a lien. The plaintiffs now sued to recover from the defendants the amount so paid under protest. The defendants contended that as agents for owners they were justified in refusing to give bills of lading until the sums due and for which they claimed a lien were paid.

Held that the defendants had no lien for the sums paid and that the plaintiffs were entitled to recover the amount claimed.

Per CANDY, J. —The plaintiffs were entitled upon demand to have the said 2,100 tons redelivered to them by the captain. On 29th June the plaintiffs were entitled to clean bills of lading at 30*s.*, and the sum paid by them under protest in order to obtain such bills of lading was recoverable by them. Under the circumstances defendants had no lien for freight and demurrage.

Per STARLING, J. —The captain was justified in refusing to redeliver the said 2,100 tons. The plaintiffs were entitled to clean bills of lading at 30*s.*, and there was no lien for freight and demurrage in respect of which the plaintiffs had paid under protest the sum claimed by defendants.

SUIT by the plaintiffs as shippers of cargo to recover from the defendants, who were charterers of the S.S. "Paddington" and also agents of the owners, the sum of Rs. 7,973-10-5, the equivalent of £523-5-5 alleged to be freight overpaid under protest to the defendants.

The firm of Karamsi Dharsi & Co. carried on the business of freight jobbers in Bombay, and on the 3rd March, 1898, they contracted to provide the plaintiffs' firm with freight for 3,000 tons of cargo (June shipment) from Bombay to Liverpool or other specified ports at 16*s.* 6*d.* per ton in a steamer to be afterwards named. On that day they handed to the plaintiffs three shipping orders for 1,000 tons each, in the usual form, addressed to the commanding officer of the ship (name of ship to be afterwards inserted). In these orders the higher and lower rate clause in the following form, "Bill of lading if required at

lower or higher rate, difference payable here as customary," was deleted according to the usual practice of the plaintiffs' firm. On the 30th April, 1898, the plaintiffs declared the port of Liverpool as the port of discharge for the 3,000 tons of cargo.

On the 11th May the defendants, who traded under the name of Mackintosh & Co., chartered the steam-ship "Paddington," of which they were also the owners' agents in Bombay. The following are the portions of the charter-party material to this report:—

"The said steamer . . . shall, after discharge of her inward cargo . . . . load at Bombay from charterers or their agents as customary, but always afloat, a full and complete cargo . . . and being so loaded shall therewith proceed . . . to Liverpool, &c., as ordered on signing bills of lading or so near thereto as she may safely get and there deliver the same always afloat *on being paid freight at the rate of* £1-10-0, *one pound ten shillings, per ton.*

"The captain to sign clean eastern trade bills of lading at any rate of freight required by the charterers or their agents without prejudice to the charter-party, but at not less than the average chartered rate, unless the difference is paid in cash before sailing, at the current rate of exchange without discount.

"Ten days on demurrage over and above said lying days to be allowed the charterers at four pence per net register ton per day, to be paid by them to the master, day by day in cash, at the expiration of which time steamer to sail full or not full, charterers paying dead freight at the above rate.

"On arrival at port of destination the cargo to be discharged without delay, and according to the custom of the port, but not less than 24 hours to be allowed from time of reporting at the customs house before unloading shall commence, and the delivery to be made on payment of freight and lodgment of bills of lading in accordance with the endorsements thereon, or against the consignee's sub-orders for any portion of such bills of lading duly lodged.

"The captain to have lien on the cargo for all freight, dead freight and demurrage, and for any other lawful claim against the freighter.

"Charterers or their agents to have the option of underletting the vessel in whole or in part.

"Charterers' or their agents' liability to cease on completion of shipment, provided the cargo is worth the freight, dead freight and demurrage, if any."

The defendants having thus chartered the "Paddington," afterwards (on 12th May) agreed that Karamsi Dharsi & Co. should take an equal interest in the charter-party with themselves. Karamsi Dharsi & Co. thus became sub-charterers of the ship under the above charter-party. On the 13th June

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they declared the S. S. "Paddington" to the plaintiffs for 2,747 tons of cargo under their contract of the 3rd March, 1898. The name of the ship was thereupon entered in the shipping orders above mentioned for that amount of cargo. For the remaining 253 tons (of the 3,000 tons contracted for by the above contract) another ship was declared.

Karamsi Dharsi & Co. thereupon, as part charterers of the S. S. "Paddington," were liable under the charter-party to pay to the owners freight at the rate of 30*s.* a ton while they had contracted to give the plaintiffs (Ralli Brothers) 2,747 tons at 10*s.* 6*d.* per ton, and (the difference of rate clause being struck out as above stated) to give them clean bills of lading at this rate for their goods. The charter-party authorized the captain to sign clean bills of lading at any rate required by the charterers, provided the difference (if any) between such rate and the chartered rate (*i.e.*, 30*s.*) were paid in cash before sailing.

On the 13th June, 1898, the plaintiffs informed Karamsi Dharsi & Co. that their cargo would be wheat and was ready for shipping, and on the following day (the 14th) the shipping commenced. It was completed on the 23rd June.

Evidence was given at the hearing that the practice in the port of Bombay was that when the cargo was brought to the Dock for shipping, it and the various documents relating to it, including the shipping orders, were taken charge of by the export cargo receiver, one of the officers employed by the Port Trustees. When the ship was ready for loading, the receiver showed the shipping order and other documents to the chief officer of the ship, who, if the documents were in order, received the cargo on board. The documents, including the shipping orders, were generally left open on the table of the receiver in order that parties concerned might refer to them. When all the cargo was shipped, the shipping orders were handed over to the captain.

The Court was of opinion that this practice was followed in the case of S.S. "Paddington," and that the attention of the captain or of the agents of the ship (the defendants) was not specially directed by the plaintiffs to the terms of the shipping orders, nor could it be said with certainty that the captain of the "Padding-

ton" was or had become aware of the terms of the shipping orders at the time the plaintiffs' goods were actually taken on board.

On the 21st June, 1898, the plaintiffs' wheat to the amount of 2,100 tons had been put on board; mate's receipts were given to the plaintiffs, and bills of lading were prepared by them at the rate of 16*s.* 6*d.* as mentioned in the shipping orders, and were presented to the captain for signature. He, however, refused to sign them unless the difference between 16*s.* 6*d.* and the chartered rate (£1-10-0) were paid to him as provided in the charter-party. The plaintiffs refused to pay the difference, having contracted with Karamsi Dharsi & Co. for clean bills of lading at 16*s.* 6*d.* per ton.

On the same day (21st June) the defendants gave notice to Karamasi Dharsi & Co. that the lay days according to the charter-party would expire on the next day (the 22nd) and that the steamer would be in demurrage, which would be claimed against them, and on the 22nd they gave the following notice:—

"22*nd June* 1898.

"Messrs. KARAMSI DHARSI & Co.,
'Bombay.

"DEAR SIRS,

"S. S. 'Paddington.'

"We are informed that there is a quantity of cargo for shipment by this steamer in the shed and that the shipper has refused to allow the loading of same to be proceeded with. The steamer will be on demurrage and we hold both you and the cargo responsible for freight, dead freight and demurrage.

'Yours faithfully,

"(Sd.) JAMES MACKINTOSH & Co"

On the 22nd June, 1898, the plaintiffs wrote the following letter to Karamsi Dharsi & Co.:—

"22*nd June* 1898.

"Messrs. KARAMSI DHARSI & Co.,
"Bombay.

"DEAR SIRS,—We beg to inform you that bills of lading of our goods shipped by the 'Paddington' have been returned to us with a request from the agents that we should pay the difference between bills of lading rate 16*s.* 6*d.* and 30*s.* alleged to be the rate at which the steamer was chartered, otherwise the agents refuse to sign the bills of lading.

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"We shall, therefore, thank you to pay the difference to the agent, Messrs. James Mackintosh & Co., or to make any arrangement that may be necessary to get our bills of lading signed as per our engagements with you, as our cargo has been already shipped in accordance with your declaration. Kindly declare us another steamer for the balance unshipped of our cargo, and please note that we have stopped shipping by the 'Paddington' until the matter is settled.

"Yours faithfully,

"*per pro.* RALLI BROTHERS,

"(Sd) C. G. GIRO."

Karamsi Dharsi & Co. were in pecuniary difficulties at this time, which led to their filing their petition in the Insolvency Court on the 27th June. They did not reply to the above letter, a copy of which was sent by the plaintiffs to the defendants with the following letter marked urgent:—

"*Bombay, 22nd June* 1898.

"Messrs. JAMES MACKINTOSH & Co.,

"Bombay.

"DEAR SIRS,—We beg to inform you that our three sets of bills of lading for 16,760 bags of wheat shipped per steamer 'Paddington' have been presented for captain's signature which you have refused. The bills of lading are filled up at 16*s.* 6*d.* per ton, the original rate at which we engaged 2,747 tons from Messrs. Karamsi Dharsi & Co.

"We shall thank you to sign our bills of lading, and we enclose herewith copy of the letter we have written to Messrs. Karamsi Dharsi & Co.

"Yours faithfully,

"*per pro.* RALLI BROTHERS,

"(Sd) C. G. GIRO."

On the same day the plaintiffs wrote to the defendants requesting them to have the cargo discharged if no bills of lading could be signed.

"*Bombay, 22nd June* 1898.

"Messrs. JAMES MACKINTOSH & Co.,

"Bombay.

"DEAR SIRS,—Referring to our letter of date, if you are not prepared to sign bills of lading at the rate agreed upon with Messrs Karamsi Dharsi & Co., kindly have the cargo discharged and we shall make the other arrangements as regards our engagements with Messrs. Karamsi Dharsi & Co.

"Yours faithfully,

"*per pro.* RALLI BROTHERS,

"(Sd.) C. G. GIRO."

The plaintiffs thereupon refused to allow any more of their cargo to be put on board the "Paddington."

On the same day the defendants wrote to Karamsi Dharsi & Co. as follows :—

"Messrs. KARAMSI DHARSI & Co.,
"Bombay.

"DEAR SIRS,

"S. S. 'Paddington.'

"Your cargo is not yet completed. The ship is on demurrage and we hold you responsible for same.

"Yours faithfully,

"(Sd.) JAMES MACKINTOSH & Co.

"*Bombay, 22nd June,* 1898."

To the above two letters of the plaintiffs, dated the 22nd June, the defendants replied on the 23rd June as follows :—

"Messrs. RALLI BROTHERS,
"Bombay.

"DEAR SIRS,

"S. S. 'Paddington.'

"Your letter of yesterday evening and this morning to hand.

"As it is the captain who has refused to sign the bills of lading and not ourselves, please address your communications to him.

"Yours faithfully,

"(Sd) JAMES MACKINTOSH & Co."

The plaintiffs then sent the following letter to the captain :—

"*Bombay, 23rd June,* 1898.

"Captain JENKINS,
"S.S. 'Paddington.'

"DEAR SIR,—Against a S/order which we had from Messrs. Karamsi Dharsi & Co. for 2,788 tons at 16*s.* 6*d.* by your steamer we have shipped 2,100 tons. We sent the bills of lading yesterday for the quantity shipped to the agents of your steamer, Messrs. James Mackintosh & Co., for your signature, who informed us that you refused to sign them except at 30*s.*, which is alleged to be the rate of the charter of the 'Paddington,' unless we pay the difference between 16*s.* 6*d.* and 30*s.* in cash here.

"As we have no agreement to pay anything more than 16*s.* 6*d.* we shall thank you either to sign the bills of lading at that rate or to discharge the cargo, and we shall make other arrangements with Messrs. Karamsi Dharsi & Co.

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"We have informed Messrs. Karamsi Dharsi & Co. that we decline to ship by your steamer any further quantity against his above order with us, unless you agree to take it and sign bills of lading at our engagement rate with him of 16*s.* 6*d.*

"We gave all these particulars to your agents, Messrs. James Mackintosh & Co., yesterday, but in reply they have referred us to you.

"Yours faithfully,

"*per pro.* RALLI BROTHERS,

"(Sd.) C. G. GIRO."

Messrs. Smetham, Bland and Noble, for the captain, replied as follows:—

"Messrs. RALLI BROTHERS,

"Bombay.

"DEAR SIRS,—Our client, Captain Jenkins of the S. S. 'Paddington,' has placed in our hands your letter to him of date with instructions to reply thereto.

"According to our client's charter-party the captain is to sign clean eastern trade bills of lading at any rate of freight required by the charterers or their agents without prejudice to the charter-party, but at not less than the average chartered rate (in this case £1-10-0 per ton) unless the difference is paid in cash before sailing.

"Our client will accordingly sign the bills of lading at any rate you wish if you pay him the difference between such rate and £1-10-0 in cash.

"If, however, you refuse to pay such difference, our client must decline to sign the bills.

"As the cargo has been shipped on board under the charter, our client cannot allow the same to be unshipped."

The plaintiffs through their solicitors, Messrs. Craigie, Lynch and Owen, sent the following letter to the captain's solicitor on the 24th June:—

"Your letter of the 23rd instant to Messrs. Ralli Brothers has been placed in our hands.

"Our clients' goods were not shipped under the charter as you allege in the last paragraph of your letter. They were shipped under three shipping orders granted to our clients by Messrs. Karamsi Dharsi & Co.

"These shipping orders were presented to the captain or the officer in charge at the time when the goods were sent on board, and it was under the authority of these documents or of one or more of them that the goods were received on board. The shipping orders expressly state that the rate of freight is 16*s.* 6*d.*, and, moreover, a clause which provides as follows:—'Bills of lading if required at lower or higher rate difference payable here as customary' has been struck out

in each of them in accordance with the practice of Messrs. Ralli Brothers, who for some time past have always refused to engage freight subject to this clause.

"Your client, therefore, had full notice of the terms on which our clients shipped the goods, and by receiving the goods on board he led our clients to believe that bills of lading for the goods at the rate of 16*s.* 6*d.* would be signed when the goods had been shipped, but when the bills of lading were presented for signature the agents refused to sign except at 30*s.*, stating that that was the rate in the charter-party.

"Our clients thereupon required redelivery of their goods, which you have now refused to give.

"Our clients have nothing to do with the charter-party, which they have never seen, and as your client has refused to give them redelivery, and insists on carrying the goods, he must carry them at the rate mentioned in the shipping orders, under the authority of which the goods were both sent and received on board, and we, therefore, call upon him to sign bills of lading at the rate mentioned in the shipping orders, *viz.*, 16*s.* 6*d.*

"Your client has no claim against ours for the difference in the rate mentioned in the shipping orders and that fixed by the charter-party. His remedy for such difference is clearly against the charterer to whom our clients refer him.

"We shall be obliged if you could send us the charter-party for inspection. We will undertake to return it in the course of the day."

The captain's solicitors (Messrs. Smetham, Bland and Noble) wrote as follows on the next day (25th June):—

"We did not receive your letter of the 24th instant in time to communicate with our client and reply thereto yesterday.

"Captain Jenkins states that the goods in question were sent on board under shipping orders granted by the charterers or their agents, and that they were accordingly shipped under the terms of the charter.

"If the charterers or their agents have made any contract with your clients which they have failed to carry out, your clients have their remedy against such parties and our client must refer your clients to them.

"We regret we have no copy of the charter-party with us, but doubtless your clients can get a copy thereof from the charterers."

On the same day the plaintiffs' solicitors replied.

"We are in receipt of your letter of to-day.

"Your client altogether evades the fact that the rate of freight which our clients had engaged to pay was mentioned in the shipping orders, and, therefore, your client had full notice of it, but he raised no objection to that rate, and received the goods on board, which amounted to an engagement on his part to carry them at that rate, and further, even supposing, for the sake of argument,

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that his conduct did not amount to an engagement to carry the goods at that rate, he certainly had no right to refuse to redeliver the goods when our clients demanded redelivery of them, and having insisted upon carrying the goods, he is now bound to carry them at 16*s.* 6*d.*, and we give your client notice through you that, if he should refuse to give delivery of the goods on payment of that sum, our clients will hold both him and the owners responsible for all the consequences, and in order that your client may have full knowledge of the consequences, we beg to inform you that our clients have sold these goods in Europe for delivery within a fixed time, and if by reason of your client's conduct they should not be able to fulfil their contracts with their purchasers and the purchasers should cancel those contracts, our clients will hold your client responsible for the difference between the price at which they may be able to resell the goods and the price at which they have already contracted to sell them, which is likely to be very considerable, and it would be as well for your client to consider whether it is worth his while to run the risk of incurring this liability.

"Yours truly,

"(Sd.) CRAIGIE, LYNCH & OWEN."

On the evening of the 24th June the S.S. "Paddington" left Bombay, the captain having neither given back the goods to the plaintiffs nor signed bills of lading at 16*s.* 6*d.* Before sailing he wrote the following letter to the defendants :—

"*Bombay, 24th June* 1898.

"Messrs. JAMES MACKINTOSH & Co.

"GENTLEMEN,—I have to request you to sign the remaining bills of lading for my steamer, the 'Paddington,' after my departure, provided they are in accordance with charter-party and with the mate's receipts, and I hereby give you this authority to sign for me, and agree to acknowledge such bills of lading on presentation.

"Yours faithfully,

"DAVID JENKINS,

"Master, S. S. 'Paddington.'"

Special Instructions.

"Send all shipping documents to my owners, Messrs. E. Thos. Radcliffe & Co., Cardiff.

'Pay all bills signed by me and adjust accounts with owners, sending copy account to me.

"D. JENKINS.

"*P.S.*—Sign Ralli's bills of lading at the chartered rate of £1-10-0 per ton.

"D. J."

And the defendants gave him the following :—

"Captain JENKINS.

"S. S. 'Paddington.'

"DEAR SIR,—As requested by you we hereby admit that the above steamer has been two days on demurrage, for which we are responsible to your owners.

"Yours faithfully,

"JAMES MACKINTOSH & Co.

"*Bombay*, 24*th June* 1898."

The following extract from a letter dated 25th June, 1898, written by the defendants in Bombay to their London Office, was put in :—

"Paddington."—"As you can well imagine, we are in an awful mess with this steamer. We had to accept as low as 18*s.* 9*d.* to complete our portion of the cargo. As regards Dharsi's share, he had declared 2,750 tons to Rallis, of which 2,100 tons was already on board when the first bill of lading was presented for captain's signature at 16*s.* 6*d.* Dharsi's difficulties being generally known at the same time we refused to allow the bill of lading to be signed under steamer's chartered rate 30*s.* Rallis always delete the 'higher or lower bill of lading rate' clause in shipping orders, so they refused to alter it, and as Dharsi could not pay us the difference we still refused to sign, with the result that Rallis stopped shipping the balance of their cargo. The steamer being already on demurrage we had to relet immediately on Kaiamsi Dharsi & Co.'s account at 18*s.* 3*d.* Meanwhile Rallis wrote stating their contract was for bill of lading at 16*s.* 6*d.*, and, if they could not obtain this, they demanded the cargo back again. Of course they threatened to stop the steamer and so forth, but we hurried up matters and got her away the same night, so they can either fill up their bill of lading now at 30*s.* or do without them. In the meantime, having given our name as charterers we are responsible to owners for our own losses, Dharsi's and two days' demurrage, but we shall be leaving you to settle the latter question with them, as we have no doubt that under the particularly hard circumstances of the case they will very considerably reduce the figure."

The ship having sailed, Messrs. Smetham, Bland and Noble informed the plaintiffs' solicitors that they no longer represented Captain Jenkins. The plaintiffs' solicitors on the 27th June, 1898, addressed a letter to the defendants. After recapitulating the facts, the letter proceeded :—

"As the captain has left Bombay without leaving instructions with his solicitors, our clients now instruct us to address you.

"We have, therefore, to draw your attention to the facts which we have stated.

"Our clients contend that the receipt of the goods on board with full notice of the terms on which they were sent on board, added to the fact that the

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clause relating to bills of lading at lower or higher rates had been struck out of the shipping orders, amounted to an engagement on the part of the captain, and through him of the owners, to carry the goods at the rate mentioned in the shipping orders, and that our clients are entitled to require, as they do now require, that bills of lading at the rate mentioned in the shipping orders should be signed and delivered to them.

"We accordingly herewith tender the bills of lading to you for signature, and we also send the mate's receipts for the 2,100 tons which have been shipped, which will be delivered to you in exchange for bill of lading signed by you at the rate of 16*s.* 6*d.*, and we will thank you to sign the same accordingly and to hand them to the bearer, Nussurwanji Pallonji, our clerk.

"They further contend that, even if there was no engagement to carry the goods at the rate of the shipping orders, our clients were certainly by the conduct of the captain led to believe that they would be so carried, and that when they found that the captain refused to carry them at that rate, they were entitled to demand redelivery of their goods, and as this has been refused, and the captain has insisted on carrying the goods, he is bound to carry them at 16*s.* 6*d.*

"We have, therefore, to give the owners and likewise the captain notice, through you, that if delivery of the goods is refused at port of destination on payment or tender of freight at the rate mentioned in the shipping orders, our clients will hold both the owners and the captain responsible for all the consequences, and in order that both the owners and the captain may have full knowledge of the consequences, we now inform you that our clients have sold these goods in Europe for delivery within a fixed time, and if by reason of the conduct of the owners or the captain our clients should not be able to fulfil their contracts with their purchasers and the purchasers should cancel their contracts, our clients will hold both the owners and the captain responsible for the difference between the price at which they may be able to resell the goods and the price at which they have already contracted to sell them, which is likely to be very considerable, and also for all other loss, damages, costs and expenses to which they may be put."

On the 28th June the defendants replied as follows:—

"DEAR SIRS,—In reply to your letter of this date we have merely to say that we have nothing to do with any arrangements your clients, Messrs. Ralli Brothers, made with Messrs. Karamsi Dharsi & Co.

"We are simply exercising the owners' lien as per their charter-party on the cargo for freight, dead freight and demurrage.

"Yours faithfully,

"(Sd.) JAMES MACKINTOSH & Co."

In consequence of the dispute as to the 2,100 tons, the plaintiffs had (as above stated) refused to ship any more cargo on board

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the S.S. "Paddington" under the shipping orders which they had obtained from Karamsi Dharsi & Co. They, however, made a separate contract on 23rd June, 1898, with the defendants for 650 tons on the S. S. "Paddington" at 18*s.* 3*d.* per ton, expressly stipulating that the difference between that rate and the charter-party rate of 30*s.* should be paid by the defendants and that the bill of lading should be filled up at 30*s.* They duly received a shipping order from the defendants containing these terms, and under it shipped 646 tons, and were paid by the defendants in cash Rs. 5,598-9-0 as the equivalent of £379-11-10, being the difference between the freight at 18*s.* 3*d.* per ton and 30*s.* as in the shipping order.

It was of great importance to the plaintiffs to obtain bills of lading for the 2,100 tons which had been taken away in the "Paddington," and they, therefore, eventually agreed to take *under protest* bills of lading at 30*s.* and to pay a sum of £800 for freight, dead freight and demurrage. This sum, however, included a claim in respect of another steamer, the "Lavernock," as well as the claim in respect of the "Paddington." On the 28th June they sent the following letter to the defendants:—

"DEAR SIRS,

"S. S. 'Paddington.'

"Referring to previous communications with you, we now beg to say that we are willing to accept bills of lading signed with the rate of freight at 30*s.* per ton under protest, we reserving to ourselves the right to recover the difference between the above rate and the rate at which we engaged freight, *viz.*, 16*s.* 6*d.* per ton and without prejudice to any of our rights against any one whomsoever.

"Yours faithfully,

"*per pro.* RALLI BROTHERS,

"(Sd.) C. G. GIRO."

On the following day the defendants sent the plaintiffs' account showing £523-5-5 due by the plaintiffs. In this account they charged the plaintiffs with £4,280-16-8 which was the total amount of Karamsi Dharsi's half share in the charter-party, and they then gave the plaintiffs credit for £3,810-18-7, which was the total amount of freight paid in respect of the shipping orders granted by or on behalf of Karamsi Dharsi & Co., which gave a balance of £139-18-1, to which was added £83-7-4 for

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two days' demurrage, making up the total amount to £523-5-5. The lower Court found that this account was correct as between the defendants as charterers and Karamsi Dharsi & Co. as sub-charterers from them, but that the items claimed could not be claimed by the defendants as agents for the owners against the plaintiffs.

On receipt of the letter and account the plaintiffs wrote:—

"*Bombay, 29th June* 1898.

"DEAR SIRS,—We beg to acknowledge the receipt of your letter of this date handing us copy account per S. S. 'Paddington' and showing the sum of £523 5-5 alleged to be due by us and asking us to send you our cheque for the equivalent, and in reply thereto we beg to send herewith our cheque No. C. 613198 for Rs. 7,973-10-5, being the equivalent of the abovementioned sum at 1/3¼ exchange, and we shall be obliged if you will acknowledge the receipt of it.

"In sending you this cheque you will please understand that we must not be taken as admitting that any portion of it is due by us. *We pay the same under protest* in order to get our bills of lading signed, and it is paid without prejudice to our right to recover either the whole or any part of it from any one whomsoever.

"We are, dear Sirs,

"Yours faithfully,

"(Sd.) C. G. GIRO."

The plaintiffs now sued to recover this sum of £523-5-5. In their plaint they said:—

"(2) The plaintiffs paid the said sum of Rs 7,973-10-5 to the defendants on the said date under protest in order to obtain from the defendants signed bills of lading in respect of 2,100 tons of cargo shipped by the plaintiffs per S. S. 'Paddington' from Bombay to Liverpool. The defendants, who were agents in Bombay of the said vessel and also charterers thereof at an average rate of freight of £1-10-0 per ton for the said voyage, refused to give the plaintiffs the said bills of lading unless the plaintiffs would pay the defendants the said sum of £523-5-5, and the plaintiffs say that such refusal on the defendants' part was wrongful and unjustifiable, and that the defendants are liable to repay the said sum with interest to the plaintiffs."

The defendants in their written statement contended that the sum claimed was paid to them as agents for the owners: that under the charter-party the owners had a lien on the 2,100 tons for freight and demurrage, and that as agents for the owners they were justified in refusing to give bills of lading until the sum claimed had been paid. They further contended

that the plaintiffs' cause of action was against Karamsi Dharsi & Co. and not against themselves.

Lang (Advocate General) and *Macpherson* for the plaintiffs.

Scott and *Lowndes* for the defendants.

TYABJI, J.:—(After stating the facts continued): The real question, therefore, before me is whether the plaintiffs are now entitled to recover from the defendants the amount which they were compelled to pay to the defendants on the 29th June, 1898.

Now a consideration of the foregoing facts and circumstances and the oral and documentary evidence in the case has forced upon my mind the following conclusions, namely:—

(1) That the plaintiffs obtained from Karamsi Dharsi & Co. their shipping orders according to their usual practice, and that they never intended to accept bills of lading at any other rate than 16*s.* 6*d.*

(2) That they sent their cargo to the dock and ultimately on board the steamer, under the belief that they would obtain bills of lading at 16*s.* 6*d.*, and that any arrangements that might be necessary for that purpose would be made by Karamsi Dharsi & Co., either with the defendants as charterers or as agents, or with the captain.

(3) That up to the point when bills of lading were first refused, the plaintiffs entertained the same intention and continued under the same impression, and that they never changed their intention except under protest.

(4) That the plaintiffs were aware of the existence of some charter-party, although they had not actually seen it and had no express notice of its existence, and that, therefore, they had constructive notice of its contents.

(5) That, on the other hand, the captain received the plaintiff's goods on board, in the usual way, and under the terms of the charter-party, without having any express notice of the plaintiffs' intention.

(6) That, at the same time, the plaintiffs' shipping orders were sent to the Port Trust officers in the usual way, and that they were open for the inspection of the captain and his officers

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and agents if they desired to see them, and that, therefore, they had constructive notice of their contents.

(7) That under the charter-party it was open to the captain to sign bill of lading at 16*s.* 6*d.* on receiving in cash the difference between that rate and the charter-party rate of 30*s.* per ton, but that he was not bound to sign bill of lading at less than 30*s.* without being paid such difference in cash.

(8) That the plaintiffs never agreed to pay the difference themselves, and that the captain, on the other hand, had never agreed to sign bill of lading except under the terms of the charter-party (and that, therefore, the plaintiffs and the captain were never *ad idem* during the shipment of the goods.)

(9) That there being no contract or privity between the plaintiffs and the captain, the latter had no right to compel the plaintiffs to ship their cargo under the charter-party, and that he was bound either to return the goods to the plaintiffs or to carry them at 16*s.* 6*d.*

(10) That, therefore, the action of the captain in this case was wrongful and that the owners had no lien on the plaintiffs' cargo in the manner insisted upon by the defendants, as the goods were never really shipped under the charter-party.

My conclusion that the captain was bound either to return the cargo or to carry it at 16*s.* 6*d.* seems to me to follow irresistibly from general principles.

Admittedly, and according to defendants' own contention before me, there was no contract or privity between the plaintiffs and the captain. On what ground, then, could the captain be justified in forcibly retaining the goods against the plaintiffs' wish? But this conclusion is amply borne out by the decisions of the English Courts (*vide Peek* v. *Larsen* [1] *The Sternoway*[2]; *Armstrong* v. *Allan* [3]; Leake on Contracts (3rd Ed.), pp. 1027 and 1024; Kay's Shipmasters and Seamen (2nd Ed.), Secs. 302, 305 and 307; *Tharsis Sulphur, &c., Co.* v. *Culliford* [4].

It was, however, contended by Mr. Lowndes that as the plaintiffs knew that there was a charter-party they must be taken to

(1) (1871) L. R., 12 Eq., 378.
(2) (1882) 51 L. J. (Adm.), 27.
(3) (1892) 8 Times L. R., 613.
(4) (1873) 22 W. R., 46.

have shipped the goods under the charter-party and subject to its provisions, and he cited a number of cases to show that the captain was the agent of the owners, that he had no authority to vary the terms of the charter-party, and that a shipper who ships with notice of the charter-party is bound by its terms. It seems to me, however, that all these cases are inapplicable to the circumstances of the present case, and I do not, therefore, think it necessary to discuss them. It is sufficient to say that there is no authority in support of the startling proposition that mere notice of the charter-party—without more—is sufficient to bind the intending shipper to all its terms. On examination of the authorities, it will be found that in order to bind the shipper there must either be an express or implied contract, or else circumstances and conduct on the part of the shipper which operate as an estoppel against him (see *Wagstaff* v. *Anderson*[1]; Scrutton's Charter-parties (3rd Ed.), pp. 41-49, Sec. 42, p. 266; Carver on Carriage by Sea (2nd Ed.), Secs. 42, 44; Secs. 675 and 676; Abbott on Shipping (13th Ed.), pp. 262, 263, 265, 266; *Pearson* v. *Goschen*[2]; *Grant* v. *Norway*[3]; *Cox* v. *Bruce*[4]; *Kay* v. *Field*[5]; *Jones* v. *Hough*[6]; *Hayn* v. *Culliford*[7]; *Small* v. *Moates*[8]; *The St. Cloud*[9]; *Schuster* v. *McKellar*[10]; Kay's Shipmasters and Seamen (2nd Ed.), Secs. 304, 306, 330; Maude and Pollock's Merchant Shipping (4th Ed.), Vol. I, page 310; 1 Parsons on Shipping, Vol. I, p. 306.

In the present case not only is there no evidence to show any acquiescence on the part of the plaintiffs, but there is direct and conclusive evidence to the contrary. The plaintiffs from the first declined to have anything to do with any shipping order under which they might be called upon to pay more than the rates which they had agreed to. The moment they discovered that they might be called upon to pay more, they at once asked the captain and the agents either to return the goods or to sign the bill of lading at 16*s.* 6*d.* There is, therefore, no pretence for say-

(1) (1880) 5 C. P. D. 171 at p. 177.
(2) (1864) 33 L. J. (C. P.) 265 at p 270.
(3) (1851) 20 L. J. (C. P.), 93.
(4) (1886) 18 Q. B. D., 147.
(5) (1882), 4 Asp. (N. S), 526.
(6) (1879), 5 Ex. D., 115, 120, 129.
(7) 1878) 3 C. P. D., 410, 416.
(8) (1833) 9 Bing., 574, 590.
(9) (1863) 1 Br. & Lush. 4, p. 15.
(10) (1857) 7 Ell. and B, 704.

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ing that the plaintiffs ever agreed to pay more, and it is impossible to point to a single act on their part which could be held as amounting to an estoppel precluding them from contending that they never shipped under the charter-party and are not, therefore, bound by its terms. What did the captain do in consequence of anything said or done by the plaintiffs, which he would not have otherwise done? It is not even pretended that the plaintiffs' goods were put at the bottom of the hold and could not, therefore, have been easily taken out again. I am, therefore, of opinion that there was no estoppel against the plaintiffs under section 115, Evidence Act (I of 1872),

But it was further contended for the defendants that as the money was exacted from the plaintiffs by the defendants, not in their personal capacity, but as agents for the owners, therefore the plaintiffs have no right to sue the defendants, but must enforce their claims, if any, against the owners. I am, however, of opinion that this contention is not well founded, for the following reasons :—

(1) Although the defendants professed to act as agents they were really acting for themselves. They took advantage of their dual position and enforced their own claim as charterers against Karamsi Dharsi & Co. under the guise of enforcing the owners' lien against the cargo.

(2) The defendants have never accounted to the owners for the moneys recovered from plaintiffs according to their account (Exhibit 6). They have treated all the moneys recovered from plaintiffs as moneys due to themselves as charterers. The account they rendered to the owners was not on the footing of the account (Exhibit 6) at all, but on the footing of moneys due from themselves as charterers to the owners. In fact, the defendants treated the moneys received from the plaintiffs as their own, precisely in the same way as the other moneys receiv[illegible] as charterers. The mere fact that the sum of £1[illegible]05 and 3[illegible] which the defendants accounted to the owners (E[illegible] partially made up of some items which are common both to Exhibit 6 and Exhibit 15, is not sufficient to support the defendants' contention, inasmuch as the footing on which they were arrived at was entirely and essentially different. The resemblance be-

tween the items is merely superficial and disappears on closer examination.

(3) As the moneys exacted from the plaintiffs were really and primarily due to the owners from the defendants themselves under the charter-party, it follows that they must be treated as moneys paid for the use and benefit of the defendants, and are, therefore, recoverable from the defendants personally. (*Vide* I Bullen and Leake, pp. 278-281, and the cases collected there.)

But it was argued that whatever might have been the original liability of the defendants to the owners, it had ceased before the payment was made, under the operation of the cesser clause in the charter-party. This clause runs as follows:—"Charterers or their agents to have the option of under-letting the vessel in whole or in part. Charterers' or their agents' liability to cease on completion of shipment, provided the cargo is worth the freight, dead freight and demurrage, if any."

Now in this case there is no evidence to show that the ship was completely loaded. On the contrary, if Mr. Hussey's evidence is to be believed, the captain expressly declared in Mr. Wilson's own presence, on the day of sailing, that the cargo was short by 80 to 100 tons. It is true that no complaint has been made by the owners about any short cargo; but as the defendants seek to escape from an admitted liability, I cannot look upon mere negative evidence of that kind as sufficient to exonerate them.

The defendants' contention that "completion of shipment" means the complete loading of any portion of the cargo, no matter how small, seems to me entirely untenable. I think that expression must be on the complete shipment of the entire cargo according to the charter-party. In my opinion, therefore, in order to escape from their liability by virtue of the cesser clause, it was necessary for the defendants not only to prove that the cargo was worth the freight, dead freight and demurrage, but that it had taken up the whole of the available space in the ship as provided in the charter-party.

But further, having regard to the dual position of the defendants, it does not, in my opinion, lie in the defendants' mouth to allege, under the circumstances of this case, that their liability

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had ceased and thus to transfer it to the cargo. Defendants as charterers were bound to pay the difference or demurrage in cash before the ship sailed. They did so in some cases. They undertook to do so in other cases (*vide* Exhibits A 12 and A 14), and it does not lie in their mouths to say that they as agents did not enforce the payments from themselves as charterers, and that, therefore, they are discharged from all liability as charterers.

As a matter of fact, in their account with the owners (Exhibits Nos. 14 and 15,) they treat themselves as liable to the owners, and it never occurred to them, till the hearing before me, to allege that their liability as charterers had in any way terminated under the cesser clause. (See Mr. Wilson's evidence in cross-examination.) This contention is, therefore, purely an after-thought and is, in my opinion, without any solid foundation. In this view of the case the authorities cited by Mr. Lowndes as to the meaning and operation of the cesser clause are inapplicable to the present case (*vide Bannister* v. *Breslauer*[1]; *Francesco* v. *Massey*[2]; *Kish* v. *Cory*[3]; *Sanguinetti* v. *The Pacific Steam Company*[4]).

Having regard to the conclusions at which I have arrived on the other parts of the case, it seems to me unnecessary to express any opinion on various points discussed at the bar, such as the liability of the plaintiffs' cargo to pay freight, dead freight, demurrage and any other lawful claim against the freighter, in respect of other people's cargo, whether the captain could enforce the lien on the plaintiffs' cargo before their arrival at Liverpool,—whether the moneys exacted from plaintiffs under VI could be properly considered as freight, dead freight, and demurrage (see *Gardener* v. *Trechmann*[5]). These questions have for my present purpose become merely of academic interest, and I do not propose to discuss them. I mainly rest my decision on the ground that the defendants were wrong in not delivering back the cargo and that, therefore, the plaintiffs were entitled to have it carried at 16*s.* 6*d.* per ton, and that all the moneys exacted from them in excess of the amount due at that rate must be refunded to them.

(1) (1867) L. R., 2 C. P., 497.
(2) (1873) L. R., 8 Ex, 101.
(3) (1875) L. R., 10 Q. B., 553.
(4) (1877) 2 Q. B. D, 238, 219.
(5) (1884) 15 Q. B. D., 154, 159.

I will now proceed to record my findings upon the issues.

(2) In the negative. The defendants purported to exercise, but did not *bonâ fide* exercise, the owners' alleged lien for the benefit of the owners. They exercised it for their own benefit.

(3) The plaintiffs paid the £523-5-5 nominally to the defendants as agents for the owners, but really for the defendants' benefit. The defendants have accounted to the owners for the sum of £437-9-11, but not specifically or really as part of the £523-5-5 recovered from the plaintiffs. (His Lordship stated his findings on the other issues and continued :—)

And I pass a decree for the plaintiffs for the sum of Rs. 7,973-10-5, being the equivalent of £523-5-5, with interest thereon at the rate of 9 per cent. per annum from 29th June, 1898, till this day, less the sum of Rs. 37-2-6, being the equivalent of £2-8-2 and interest thereon brought into Court, and less the further sum of Rs. 508-7-1, being the equivalent of £33-7-4 refunded to the plaintiffs on 10th September, 1898 (and interest on the two last mentioned sums from the dates of their respective payments) and costs. Further interest on judgment at 6 per cent. per annum till payment.

This decree is without prejudice to the right of the plaintiffs (if any) to recover the difference between the amount of the freight on 2,100-5,555 tons at the rate of 16*s.* 6*d.* per ton and 30*s.* per ton by virtue of the plaintiffs' protest.

Against this decree the defendants appealed.

Lowndes (*Scott* with him) for the appellants (defendants) :— The money which the plaintiffs now seek to recover was paid to the defendants as agents of the owners by reason of the lien which the owners had on the plaintiffs' 2,100 tons of cargo for the unpaid balance of freight due to the owners under the charter-party at 30*s.* per ton and for demurrage. The plaintiffs have now brought this suit against the defendants in their personal capacity to recover this money. The main question is, was there a lien on the 2,100 tons? The plaintiffs contend there was not, alleging that their goods were not shipped under the

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charter-party which gave the lien, but under the shipping orders obtained by them from Karamsi Dharsi & Co. We say that the plaintiffs knew there was a charter-party and must, therefore, be taken to have known that the goods could only be taken on board on the terms and conditions contained in it—*Peek* v. *Larsen*[1]; Abbott on Shipping (13th Ed.), pp. 265-6; *The Stornoway*[2]; *Kay* v. *Field*[3]; *Jones* v. *Hough*[4]; *Hayn* v. *Culliford*[5]; *Small* v. *Moates*[6]; Kay's Law of Ship-Master and Seamen, Secs. 302, 304, 305 and 307; Maude and Pollock, Vol. I, p. 310; Scrutton on Charter-party, pp. 41-42; Carver's Carriage by Sea, pp. 97, 689; *Shand* v. *Sanderson*[7]; *Armstrong* v. *Allan*[8]; *Fry* v. *Chartered Mercantile Bank of India, &c.*[9]; *Pearson* v. *Goschen*[10]; *The St. Cloud*[11].

From the fact that shipping orders at the rate of 16*s.* 6*d.* per ton had been given to the plaintiffs, it does not follow that they tendered their goods for shipment at that rate. See Abbott on Shipping, pp. 262 to 264; Carver's Carriage by Sea, Secs. 41, 44; Scrutton on Charter-party, p. 49; *Grant* v. *Norway*[12]; *Cox* v. *Bruce*[13]; *Pearson* v. *Goschen*[14].

The right to lien was never waived—Scrutton on Charter-party, Sec. 153, p. 277; Abbott on Shipping, p. 266. The defendants exercised the owners' lien and paid the money over to the owners. The charterers and the cargo were both liable to the owners, and the defendants as owners' agents realized the sum due from the cargo. The money was really due by Karamsi Dharsi & Co. to the defendants under the sub-charter and to the plaintiffs under the contract made by them for shipping. Whoever has to pay in this suit will recover it from Karamsi Dharsi & Co.

The lower Court held that the defendants as charterers were primarily liable. That is not so. See cesser clause in charter-party. As to the meaning of cargo, see *Bannister* v. *Breslauer*[15];

(1) (1871) L. R., 12 Eq., 378.
(2) (1882) 51 L. J. (Adm.), 27.
(3) (1882) 4 Asp. (N. S.), 526.
(4) (1879) 5 Ex. D., 115 at p. 129.
(5) (1878) 3 C. P. D., 410.
(6) (1833) 9 Bing., 574.
(7) (1859) 28 L. J. (Ex.) 278; 4 H. and N., 381.
(8) (1892) 8 Times L. R., 613.
(9) (1866) L. R., 1 C. P., 689.
(10) (1864) 33 L. J. (C. P.), 265; 17 C. B. (N. S.), 352.
(11) (1863) 8 Law T. Rep., 54.
(12) (1851) 20 L. J. (C. P.), 93.
(13) (1886) 18 Q. B. D., 147.
(14) (1864) 33 L. J. (C. P.), 265.
(15) (1867) L. R., 2 C. P., 497.

Gray v. *Carr*[1]; *French* v. *Gerber*[2]; *Sanguinetti* v. *Pacific Steam Co.*[3].

The lower Court had no power to reserve a right to the plaintiffs to claim difference between 16*s.* 6*d.* and 30*s.* by separate suit.

They also cited *Christie* v. *Lewis*[4]; *Porteus* v. *Watney*[5].

Macpherson with *Lang* (Advocate General) for respondents (plaintiffs):—The defendants are sued in their dual capacity as agents of owners and as charterers. The plaintiffs shipped the goods in question and the defendants claim as agents for owners to have the lien upon them which is given by the charter-party. But the plaintiffs did not ship under the charter-party. Notice of a charter-party no doubt shows that a shipper intends to be bound by the rate mentioned in it, but this inference may be rebutted—Abbott on Shipping, pp. 260—266; *Shand* v. *Sanderson*[6]; *Peek* v. *Larsen*[7].

We were no doubt put upon enquiry, and the result of the enquiry was that the plaintiffs struck out the clause in the charter-party—Kay on Shipmasters and Seamen, Sec. 306, p. 209; *Gardner* v. *Trechmann*[8]; Carver on Carriers by Sea, Sec. 676, p. 680; *Watkins* v. *Rymill*[9].

CANDY, J.:—It is unnecessary to recapitulate the introductory facts, which are lucidly set out in the judgment of the Division Court.

On the preliminary point (that on the allegations in the 3rd paragraph of the plaint being given up the claim was at once demurrable), I have no doubt. The disputes between the parties were clearly set out in the issues. Mr. Justice Tyabji ruled that the case should proceed without prejudice to the right of defendants to apply for adjournment for further evidence if necessary. No evidence has been shut out, and it is quite impossible for the Court now to refuse to decide the case on the merits.

(1) (1871) L. R., 6 Q. B., 522.
(2) (1876) 1 C. P. D., 737.
(3) (1877) 2 Q. B. D., 238.
(4) (1821) 2 Br. and B., 410 at p. 441.
(5) (1873) 3 Q. B. D., 534 at p. 538.
(6) (1859) 4 H. and N., 381.
(7) (1871) L. R., 12 Eq., 378.
(8) (1834) 15 Q. B. D., 151.
(9) (1883) 10 Q. B. D., 178.

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The 2nd paragraph of the plaint recites that the defendants refused to give the plaintiffs the bill of lading unless the sum of £523-5-5 was paid, and the plaintiffs say that such refusal was wrongful and not justifiable. That is the main question. Was the refusal, under the circumstances stated, wrongful? The answer to that question depends upon the finding on the 14th issue *viz.*, "Whether the plaintiffs upon learning that bills of lading would not be signed for the 2,100 tons at 16*s.* 6*d.* were not entitled upon demand to have the said 2,100 tons redelivered to them by the captain?"

In arriving at a finding on this issue I have consulted the various authorities and cases quoted at the bar; but I do not think it necessary to burden this judgment with a resumé of them. It seems to me that the task imposed upon the Court is to find some legal principle upon which the decision must rest. The facts of this case do not exactly tally with the facts of any reported case, and it would be only waste of time to distinguish this or that case from the present one.

Now what were the relations between the parties when plaintiffs sent their wheat on board? First there was the contract of the charter-party between defendants and the owners of the S.S. "Paddington." Then there was a contract between plaintiffs and Karamsi Dharsi & Co. that the latter would have the plaintiffs' wheat conveyed to Liverpool in the S.S. "Paddington" at 16*s.* 6*d.* a ton, and plaintiffs had deleted in the memoranda of the agreement (the shipping orders) the "lower or higher rate" clause. Karamsi Dharsi & Co. had agreed to this deletion. No doubt plaintiffs knew, when they sent the wheat on board, that the ship was a chartered ship, and they must be taken to have known the charter rate (30*s.*), and the other clauses in the charter-party, which was in the usual form. Therefore they must be taken to have known that there was the customary clause that the captain was to sign clean bill of lading at any rate of freight required by the charterers or their agents, without prejudice to the charter, but at not less than the average chartered rate, unless the difference was paid in cash before sailing. Therefore they are entitled to take advantage of that clause. As a fact, they had not seen the charter-party when

they sent their wheat on board, and they and their solicitors contended that the goods were not shipped under the charter-party, but that the captain by receiving the goods under the shipping orders had entered into an engagement to carry the goods at the rate inserted in the shipping orders—contentions which are not sound.

But when it is found that the plaintiffs are legally affected with notice of the charter-party, then it would be inequitable to disallow them the benefit of any clause in the charter-party. Their wheat having been sent on board under shipping orders signed by the sub-charterers (which fact was known to the captain), they were entitled to clean bills of lading at 16*s.* 6*d*, the difference between 16*s.* 6*d.* and 30*s.* being paid in cash before sailing. Of course, if Karamsi Dharsi & Co. had not been in pecuniary difficulties, they would have paid or caused to be paid this difference, and the clean bills of lading with 16*s.* 6*d.* inserted would have been given to plaintiffs as they demanded. But Karamsi Dharsi & Co. could not pay. What then happened? Defendants, who were in the dual position of charterers, and so liable to the owners under the contract contained in the charter-party, and also agents for the owners, refused to let the captain sign the bills of lading under the chartered rate (see their letter *supra*). Then at once plaintiffs demanded their wheat back again. The captain refused, and left Bombay with the wheat on board, no bills of lading for it having been then signed.

Were the plaintiffs entitled to thus demand their cargo back? Mr. Lowndes points to the extreme inconvenience which would be caused by shippers, after shipping goods for eight days, demanding the goods back because the charterer would not fulfil his contract with them and procure bills of lading at his contract rate. True, but it would be also inconvenient for shippers, if they after receiving notice from the sub-charterer that the ship was ready to receive the goods which he (the sub-charterer) had contracted with the shippers should be conveyed at 16*s.* 6*d.*, must first go to the sub-charterer and satisfy themselves what is the chartered rate, and whether the sub-charterer can give security for the due payment before the ship sails of the difference between the contract and the chartered rate. It is not a question of balance of inconve-

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nience: the question is whether the shipper, being taken to have known of all the clauses in the charter-party, must be assumed by sending his goods on board to have contracted with the owners to be bound by all the terms of the charter-party as to chartered rate, owners' lien, &c., —if the sub-charterer who contracted with him fails to perform his contract, *i.e.*, to procure for him clean bills of lading at a lower rate than the chartered rate, by paying the difference according to one of the clauses in the charter-party. I entirely agree with Mr. Lowndes that plaintiffs could only require the charterers (including the sub-charterer) to obtain for them bills of lading *according to the charter*. But the charter-party provided for plaintiffs obtaining just what they wanted. It cannot be pretended that until a bill of lading is signed there is any *express* contract between the shippers and the ship. Is there an implied one,—implied from the fact that the shippers sent the goods on board in accordance with the order given by the charterers? Surely their conduct raises no implication: they acted strictly in accordance with the mercantile usage of the port. They sent the goods with the shipping orders to the Port Trust officials, and from that time everything was done according to the rules. Directly they heard that there would be a difficulty about procuring bills of lading at a lower rate than the chartered rate, which was permissible according to a special clause in the charter-party, they stopped shipping and demanded their goods back. And what did the charterer do? He said in effect: "True, as charterer I am responsible to the owners of the ship: true, my partner in the charter will not pay the difference in rates and so procure the bills of lading as demanded: nor will I: nor will I let the captain sign for less than the charter rate, but I will hurry up matters and get the steamer off with the shippers' goods on board, and then they must take bills of lading with 30*s.* rate inserted or do without them." I confess, on a view of the equities of the case, there can be little or no doubt. The crux of the whole matter seems to me to lie in this, that notice of the charter-party, which is the foundation of defendants' argument, makes no difference in the present case, because the charter-party empowers the captain to sign bills of lading at any rate of freight. That was the argument of Mr. Blackburn

(as he then was) when as counsel in *Shand* v. *Sanderson*[1] he succeeded in his demurrer. Of course, plaintiffs must be taken to have shipped under the charter-party: they must, therefore, be taken to have shipped under that clause. If they had notice, actually or impliedly, that there was no such clause in the charter-party, the case might be different. It was the charterers who prevented that clause being acted on. But that clause is for the benefit of the charterers, so that they may carry out their contracts with the shippers of goods. Surely, if they prevent its being acted on, the shippers may demand back their goods. Otherwise charterers may induce shippers to send their goods on board a ship in the belief that the clause will be acted on, and then may refuse to let it be acted on, and thus compel the shippers to accept bills of lading at a higher rate than what they contracted for. Mr. Lowndes in his able argument naturally relied on the judgment of the Master of Rolls, Lord Romilly, in *Peek* v. *Larsen*[2], and no doubt there are expressions in that judgment which taken by themselves may be used as a foundation for the argument that in the present case the plaintiffs were not entitled to demand their cargo back. In *Peek* v. *Larsen* it was held that the shippers were so entitled. Lord Romilly said: "The case depends upon this:—Had the plaintiffs, the shippers, notice of this charter-party, or was it their bounden duty to inquire whether there was a charter-party or not? I fully admit that every person is bound by the contents of a charter-party of which he has notice." And so it is contended that, as the shippers in the present case had notice of the charter-party, therefore they were bound to accept bills of lading with the chartered rate, and not their contract rate, inserted; and on the charterers refusing to allow the captain to give bills of lading at less than the chartered rate, the shippers could not demand back their cargo. But it is more than doubtful whether Lord Romilly would have assented to such a contention. On the contrary, he said: "Why is the shipper not to be allowed to have back his goods? *He has entered into no contract.* This would be to bind him by a contract which not only he has never entered into, but which he has refused to enter into.' Is not that principle applicable to the

(1) (1859) 4 H. and N., 381. (2) (1871) L. R., 12 Eq., 378.

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present case? Plaintiffs were not guilty of laches; they acted strictly in accordance with the custom of the port for sending goods on board. The agents of the owners and the charterers knew that plaintiffs always delete the higher or lower rate clause in shipping orders. They knew that plaintiffs had not contracted for anything but 16*s.* 6*d.* No fresh contract was entered into. On what principle, then, were plaintiffs not entitled to have their goods back?

It is interesting to note that in *Peek* v. *Larsen*, plaintiff's counsel contended that the charter-party authorized the captain to sell bills of lading at a lower rate of freight than that reserved to the owners of the vessel, while defendants' counsel contended that the captain had no authority to sign bills of lading except on the terms of the charter-party, meaning apparently except with the chartered rate inserted. Lord Romilly did not allude to this point: it is untouched by the judgment, which rests on the principle that the shippers had entered into no contract (express or implied) which could compel them to receive bills of lading at a rate higher than their contract rate; and as they were not guilty of any laches they could ask for their goods back. As Cockburn, C. J., said in *Jones* v. *Hough*[1], the most material circumstance in *Peek* v. *Larsen* was that the shipper of the goods finding he could not get a bill of lading without reference to the terms of the charter, said: 'This is not the contract upon which I desired to enter, or upon which I shipped my goods.'

Here the most material circumstance is that the shippers, being taken to have known of the existence of the charter-party, but finding that they could not get bills of lading according to a special provision of that charter-party, and finding that the captain and charterers refused to give them bills of lading without the insertion of a rate different from their contract rate, said: "That is not the contract upon which we desired to enter or upon which we shipped our goods." Therefore, they were entitled to a return of their goods.

It must be remembered that at this stage of the case which we are considering, no bill of lading had been given. If plaintiffs had succeeded in getting from the captain bills of lading at

[1] (1879), 5 Exch. D., 115, at p. 120.

16*s.* 6*d.* without the difference being paid, then since the shippers knew that neither charterer nor master had authority to bind the shipowner by granting bills of lading, unless the master at the same time received the difference between the chartered and the bill of lading freight, they would not have much reason to complain if they were held to be estopped from denying that they had shipped their cargo subject to all the terms of the charter-party. As to such a case, reference may be made to the remarks on page 265 of Abbott on Charter-party (13th Ed). The learned authors proceed to discuss the case of *Peek* v. *Larsen*, in which it was suggested that a shipper might, by allowing his goods to be stowed at the bottom of the hold and by not applying for his bill of lading in due course, be guilty of laches, and so be prevented from relying on the absence of notice. "But even in such a case it is difficult to see what the shipowner could do except either to give up the goods, or to carry them on the terms on which the shipper sent them, or at the current freight, *for there is no other contract on which the latter can be charged*. It is submitted, that even if a shipper before sending his goods for shipment had notice of the existence of a charter-party he would be entitled to make the same demand." The learned authors then make remarks which seem to show that there are, in their opinion, *obiter dicta* in Lord Romilly's judgment conflicting with the proposition set forth above. With great respect, I venture to think that Lord Romilly's decision rests on the principle which the learned authors maintain, *viz.*, contract. So here the question is, contract or no contract? If no contract, were plaintiffs guilty of laches? If not, why could not they ask for their goods back? Plaintiffs did not request the captain to exceed his authority. If, because the charterers would not and the sub-charterers could not arrange for him to give bills of lading under a clause in the charter-party which permitted him to give what the plaintiffs asked for, he was unable to comply with their request, then he had no course open but to return the goods. For a very similar case, a "clean receipt" being asked for, reference may be made to *Armstrong* v. *Allan*[1].

I find, then, that the captain wrongfully refused to return the goods upon plaintiff's demand. He was, therefore, a converter

(1) (1892) 8 Times L. R., 613.

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of those goods. But the matter does not rest here. Plaintiffs being anxious to obtain clean bills of lading—the goods being on their way to Liverpool without any bills of lading at all—had an interview with defendants on 28th June; and defendants then said: "We will not give you clean bills of lading, even at the chartered rate, unless you give us a sum of money, say £ 520." Defendants were then affecting to exercise the owners' lien as per their charter-party for freight, dead freight and demurrage. Leaving aside for a moment the consideration of what the defendants affected to do, and what they really did do, and treating the demand as simply a demand for a sum of money, the question is, were the plaintiffs forced to give this sum of money in their desire to get possession of what they were entitled to possession of? In my opinion this question must be answered in the affirmative. The captain having wrongfully refused to give back the goods, was bound to convey them at the rate at which the sub-charterers had contracted, certainly if that was a reasonable rate; and it is not pretended that rate 16*s.* 6*d.* was not a reasonable rate. Therefore, apart from any remedy which the plaintiffs might have had for wrongful conversion, the plaintiffs were entitled to ask for bills of lading at 16*s.* 6*d.* To get that which was their due, or rather to get the bills of lading at 30*s.*, which was even something less than their due, plaintiffs were compelled by defendants to pay a sum of money. Therefore, they can recover back that sum of money.

But the case does not even rest here. When the captain was asked by the plaintiffs to give clean bills of lading at 16*s.* 6*d.* he replied: "No. I cannot under the charter-party do that, unless the difference is paid; but I can give you clean bills of lading at 30*s.*" That was his proposal made up to the time of his sailing, but there was no acceptance on plaintiffs' part. So there was no agreement. That the captain could do what he proposed, is clear from the charter-party. His authority expressly given by the charter-party to sign clean bills of lading at less than the chartered rate, if the difference should be paid, would imply a distinct authority to give clean bills of lading at the chartered rate. This is what he offered, but the plaintiffs would not accept, and demanded their goods back. But the captain sailed

away with their goods, and one of the last things he did was to leave authority with defendants to sign bills of lading for him, and he particularly authorized them to sign plaintiffs' at 30*s.* (see A 13, p. 164). It is obvious from his conduct that he meant that defendants should sign clean bills of lading at 30*s.* Defendants clearly so understood. On the very next day (25th June) they wrote to their London agents that they had hurried the steamer off: so Rallis can either fill up their bills of lading now at 30*s.* *or do without them.* That was the alternative. Clean bills of lading at 30*s.* or no bill of lading at all. But when the interview took place on 28th, defendants went further. First they proposed that Rallis should do without any bills of lading at all. That Rallis declined, and they said: "Though we are not bound to accept bills of lading at 30*s.* we will do so under protest." Then defendants turned round and in effect said: "It is true that the captain's express authority to us is to give you clean bills of lading at 30*s.*, that is, what he would have done and in so doing he would not have exceeded his authority. But we must protect owners' lien, &c., so we will not give you clean bills of lading even at 30*s.*, unless you give us enough money to reimburse us what Karamsi Dharsi & Co. owe us, and what in consequence of their default we have to make good to the owners." On these facts it can be fairly argued that Rallis were on 28th June entitled to clean bills of lading at 30*s.*, and when defendants compelled them to pay £ 520 odd to get what they were entitled to, defendants must refund the same. Of course I take it that the clear intention of the charter-party was that the captain should sign bills of lading as agent for the owners and not as agent for the charterer. It is obvious that in such a case he does so. See Carver's Carriage by Sea (2nd Ed.), pp. 165, 166, 170.

In this view of the case it is unnecessary to dwell at length on the arguments which were addressed to us in regard to the nature of the sum of money which defendants compelled plaintiffs to pay on the 28th June.

Defendants affected to be exercising the owners' lien on the cargo for freight, &c., as per their charter-party. The clause in the charter-party is "The captain to have a lien on the cargo

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for all freight, dead freight and demurrage, and for any other lawful claim against the freighter." As this prospective lien of the captain could only arise on the arrival of the goods at Liverpool, it is difficult to see how the owners' agents could exercise it on 28th June in Bombay.

However that may be, when asked to render an account showing the sum due by plaintiffs, defendants rendered the account (Ex. 6), dated 29th June, 1898, showing what Karamsi Dharsi & Co. owed to defendants in regard to the loss on the charter-party as between defendants and the owners of the ship, and when asked to explain this absurdity, they gave an explanation which admittedly was no explanation at all. Even in this account, defendants did not deal fairly with Karamsi Dharsi & Co, for they made no allowance for "pockets," an allowance which they claimed and obtained from the owners. The absurdity of the account (Ex. 6) is shown by the fact that defendants claimed to recover from plaintiffs the difference in the rate of a shipment of 646 tons which defendants had let to plaintiffs at 18*s.* 3*d.* a ton, but the bill of lading of which, at defendants' special request, plaintiffs had consented to receive with the chartered rate of 30*s.* inserted, defendants paying there and then the difference between 18*s.* 3*d.* and 30*s.* That very difference, which defendants had voluntarily paid plaintiffs on one day, defendants claimed to recover back from plaintiffs on another. However, turning for a moment to the account rendered by the defendants after the suit was filed, we find that it is made up of two items (a) £437-9-11 and (b) £83-7-4—total £520-17-3. Item (a) is made up thus: Defendants gave shipping orders to Meghji Vallabhdas, D. Sassoon & Co., Sanday & Co. and Latham & Co to ship wheat (amounting altogether to about 944 tons) at rates below chartered rate (20*s* and 18*s.* 9*d.*). According to the charter-party the difference between these rates and the chartered rate was to be paid in cash before sailing. As defendants said in their letter to the captain, A 12 (p. 163), "*we* pay the difference here." Defendants, both as agents of the owners and as charterers, and the captain all failed in their duty. The money was not paid. For Sanday's and Latham's shipments

bills of lading were given after the steamer had left. The duty imposed on defendants still remained. Now defendants say, "We had a right on 28th June to exercise the owners' lien and to compel plaintiffs to pay us that difference due on the consignments of those four shippers, for which the captain at the end of the voyage would, owing to our default, have had a lien on the goods." It is more than doubtful whether there was under those circumstances any shipowners' lien even over the goods of those four shippers for this difference in freight (see *Gardner* v. *Trechmann*(1)). Certainly there could be none against plaintiffs' goods. So, too, with item (b). It represents demurrage, which by the terms of the charter-party was to be paid *in cash by the charterers to the master day by day*. The captain asked for it. Defendants failed in their duty and did not pay it, but they gave the captain a letter (A 14) in which they admitted that they were responsible to the owners for the same. But on 28th June defendants claimed to say that as they had failed in their duty, they could legally compel plaintiffs to pay them what they admitted was due from them to the owners. As a matter of fact, the authority of the case last quoted shows that there was no owners' lien for the demurrage under the circumstances which happened. But, apart from that, defendants could not, in the position in which they stood, exercise, as owners' agents, a lien which might prospectively come into existence solely owing to their default as charterers.

In the view which, as shown above, I take of the case it seems to me that defendants throughout have been altogether in the wrong, and that the order of the learned Judge of the Division Court, decreeing with costs the full amount claimed (*minus* the sums paid into Court), was right and should be confirmed with costs. As to the remark made by the learned Judge at the end of his judgment, and the declaration in the decree that the decree was without prejudice to the right of the plaintiffs (if any) to recover the difference between the 16*s.* 6*d.* and 30*s.* rates, it is, I think, sufficient to remark that, if the plaintiffs' alleged right legally exists, the declaration in the decree does not give it greater force,

(1) (1884) 15 Q. B. D., 154

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and if it does not legally exist, the declaration in the decree will not give to it legal effect. I would, therefore, omit it from the decree.

STARLING, J.:—The plaintiffs in this case, Ralli Brothers, in March, 1898, entered into a contract with Karamsi Dharsi & Co. by which they agreed to take and the latter to furnish them with 3,000 tons of freight in a first class steamer, to be thereafter named, for shipment in June to one or more of certain named ports in Europe. Subsequently the plaintiffs declared Liverpool for their option of ports and Karamsi Dharsi & Co. afterwards declared the S. S. "Paddington" as the steamer on board which they would furnish room for the plaintiffs' goods, and inserted that name in the document hereinafter referred to. This contract was made between these two parties through a broker, and on the contract being completed, shipping orders signed by Karamsi Dharsi & Co. were sent to the plaintiffs, which, besides containing the usual authority to the captain to receive the goods, also contained the terms of the contract between the plaintiffs and Karamsi Dharsi & Co.

The S. S. "Paddington" was chartered in London by the defendants' firm there, and by an agreement between Karamsi Dharsi & Co. and the defendants here it was agreed that they should be equally interested in the charter-party, and it was by virtue of this agreement that Karamsi Dharsi & Co. inserted the name of S. S. "Paddington" in the shipping orders signed by them and given to the plaintiffs. Consequently all goods shipped under those shipping orders were, as between Karamsi Dharsi & Co. and the ship, shipped in fulfilment of their obligations as part charterers.

It also appears from the evidence that although the plaintiffs did not know the exact terms of the charter-party, they took it for granted that there was a charter-party and that it contained nothing but the usual terms, which was in fact the case.

The shipping order declared the rate of freight to be 16*s.* 6*d.* a ton, and the plaintiffs had, before they accepted the order, insisted upon the clause "Bills of lading, if required, at lower or higher rate, difference payable here as customary," being deleted. Con-

sequently as between them and Karamsi Dharsi & Co. they were entitled to clean bills of lading at 16*s.* 6*d.* a ton. The charter-party provided that the captain was to sign bills of lading at any rate required by the charterers, but that, if that rate was less than the average chartered rate (30*s.*), the charterer was to pay the difference before the ship sailed, and it was further there provided that freight, dead freight and demurrege was to be a lien on the cargo.

The S.S. "Paddington" was ready to take in her outward cargo just before the middle of June, of which notice was given to the plaintiffs, who, on and after the 14th June, began shipping their goods. The process of shipment is as follows:—The goods with the shipping orders are sent down to the Docks, and after certain formalities, immaterial to the decision of this case, the goods are lodged in one of the sheds near which the steamship is moored, and the shipping orders are kept in the shed office and are there referred to from time to time by the chief officer, who superintends the reception of goods by the ship, in order to see what goods are coming down from time to time for shipment, and they are also open to the inspection of the captain if he chooses to come and look at them, but it would appear that ordinarily he does not see them till the steamer is about to start, when they are handed over to him.

On the 22nd June it became known to all persons having any dealings with Karamsi Dharsi & Co. that that firm was insolvent and would not be able to fulfil any of its engagements. The plaintiffs, therefore, sent bills of lading for these goods already on board to the captain for his signature filled up at 16*s.* 6*d.* Under ordinary circumstances he would have signed them, and Karamsi Dharsi & Co. would have paid the difference between 16*s.* 6*d.* and 30*s.* before the ship sailed; but, as he knew that they would be unable to make such payment, he refused to sign the bills of lading, unless the plaintiffs paid the difference between 16*s.* 6*d.* and 30*s.*

I stop here to point out the rights and liabilities of all parties up to this period of time.

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Under the contract for freight the plaintiffs had a right to call upon Karamsi Dharsi & Co. to obtain for them clean bills of lading at 16*s.* 6*d.* and Karamsi Dharsi & Co. were bound to make such arrangements as would enable them to fulfil this contract. How this was done, was absolutely immaterial to the plaintiffs, and under ordinary circumstances they would have received their bills of lading and probably not have known by what means Karamsi Dharsi & Co. carried out their contract. To fulfil their engagements, Karamsi Dharsi & Co. chartered half the space in the S. S. "Paddington" and then authorized the plaintiffs to ship their goods in that steamer by filling in her name in the shipping order already referred to, under which the goods were shipped. As between Karamsi Dharsi & Co. and the ship, these goods were shipped in part fulfilment of their liabilities under the charter-party; but in what position did the plaintiffs stand? The authorities cited in the course of the argument show that where a ship is held out publicly as a general ship, and a person ships goods on board of her, he is not bound by any of the terms of the charter-party, but that where he knows of a charter-party he is *primâ facie* bound by its terms, though to what extent depends upon circumstances. Consequently, I am of opinion that a shipment by the plaintiffs under a shipping order signed by Karamsi Dharsi & Co was *primâ facie* a shipment under the terms of the charter-party.

But, argued Mr. Macpherson on behalf of the plaintiffs, admitting so much, the plaintiffs gave the captain notice that they were shipping under certain terms and that they offered him their goods under those terms only, and that if he refused to take them on those terms, he ought not to have accepted them, and that if he accepted them, he accepted them on those terms and no others. Now I will assume that the captain saw the shipping note, read it, and compared its terms with those of the charter-party. Taking the case most favourable for the plaintiffs, what would he find therein? That the plaintiffs insisted on having bills of lading signed at 16*s.* 6*d.* and would not have bills of lading at any other rate, paying or receiving the difference between that rate and 16*s.* 6*d.* to or from Karamsi Dharsi & Co. Turning to the charter-party, he would find that he was author-

ized to sign bills of lading at 16*s.* 6*d.* and that Karamsi Dharsi & Co. would thereupon be bound to pay the difference between 16*s.* 6*d* and 30*s.* Consequently Karamsi Dharsi & Co. being supposed at that time to be solvent, the captain's reception of the goods with knowledge of those terms would be a receipt under the charter-party, because the natural inference would be that Karamsi Dharsi & Co. intended to pay the difference, and the fact that Karamsi Dharsi & Co. subsequently became unable to fulfil their part of the contract would not alter the position of the captain with regard to goods already shipped. Consequently I hold that these goods were under all the circumstances of the case shipped under the charter-party and were subject to its terms.

In case the captain refused to sign the bills of lading at 16*s.* 6*d.*, the plaintiffs demanded, in the alternative, that he should return them their goods which he refused to do, and such refusal was justifiable, seeing that the goods were shipped under the charter-party.

When the captain refused to sign bills of lading, or return their cargo, the plaintiffs ceased shipping under Karamsi Dharsi & Co.'s shipping orders, and engaged freight for the unshipped portion of their consignments from the defendants on the S. S. "Paddington" at 18*s.* 3*d.*, the bills of lading to be filled up at 30*s.* and the defendants paying the difference.

On the 24th June the steamer left Bombay with the plaintiffs' goods on board, the captain having signed no bills of lading for those shipped under Karamsi Dharsi & Co.'s shipping orders.

When the S. S. "Paddington" had started, communications continued between the plaintiffs and defendants with regard to the signing of bills of lading by the defendants, who were authorized to do that by the captain before he left, and with regard to the conditions on which they were to be signed. The defendants first suggested that the goods should go to Liverpool without bills of lading, and that they should be claimed there on the mate's receipt on payment of what might then be due to the ship. If this had been done, as will be seen from my conclusions

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hereafter set forth, I am of opinion, the plaintiffs would have got them on payment at the rate of 30*s.* a ton, and *perhaps* the sum due for demurrage only without any claim for difference of freight, but this did not suit the plaintiffs, as they wanted clean bills of lading.

Now were the plaintiffs entitled to bills of lading at all? As I understand Mr. Lowndes' argument, he contended that there was no contract between the plaintiffs and the ship, and, consequently, they could not demand bills of lading at all; but is this so? It is quite true that, in the first instance, the contract to give bills of lading was between the ship and the charterers, but by their shipping orders they assigned portions of their right to ship goods to the merchants who had goods to ship, and it seems to me that the ship recognized the rights of the merchants as assignees by issuing to them mate's receipts in their names containing therein no mention of the charterers (see Exhibit 18). Now as bills of lading are ordinarily signed and delivered on production of the mate's receipts, and it is the shippers to whom the bills of lading are necessary, it seems to me that where what may be called clean mate's receipts (*i.e.*, without any reference to any one but the shippers) are given to the shippers of goods, they have a right to demand bills of lading, subject, of course, to the charter-party, under an assignment of a portion of which they are entitled to claim them. Consequently, in my opinion, the giving of bills of lading by the defendants under the captain's authority was not a gratuitous act, but a duty. As to the terms upon which those were to be granted, those depended upon the rights of the ship on the one hand and the shippers on the other, and the mode in which it was arranged those rights should be adjusted and carried out. The captain before he sailed was willing to have signed bills of lading for the plaintiffs at 30*s.* and that they were, in my opinion, entitled to have demanded, but they refused to accept them and asked for bills of lading at 16*s.* 6*d.* without any payment of difference, or a return of the cargo, to neither of which they were entitled.

When the steamer had sailed, the state of things was altered, and I do not think that then the plaintiffs were necessarily

entitled to demand clean bills of lading at 30*s*. Under the provision of the charter-party, the liability of the charterers ceased on the departure of the steamer, and, in respect of all freight, dead freight and demurrage, the ship had a lien on all cargo not covered by clean bills of lading. Accordingly the defendants claimed to hold the plaintiffs' cargo to satisfy such lien.

In their first letter on the subject, dated 28th June, 1898, the defendants write: "We are simply exercising the owners' lien as per their charter-party on the cargo for freight, dead freight and demurrage." We may leave out dead freight, as none was ever claimed. That was a perfectly justifiable position for the defendants under the circumstances to take up in form, but the validity of the claim also depended upon whether, as a matter of fact, there was any freight and demurrage in respect of which a lien could be claimed. The defendants demanded that the plaintiffs should pay them the amount in respect of which they claimed a lien, and that they would then sign bills of lading at the charter rate of 30*s*. per ton. To this the plaintiffs agreed, got their bills of lading, and paid the defendants £523-5-5 in respect of those claims. The question then arises, was there a lien for that or any sum at the time the bills of lading were demanded? If there was, then the defendants were justified in receiving and retaining that sum; if there was not, then, to the extent to which there was no lien, the plaintiffs are entitled to recover from the defendants or the ship. Now the first account of how the defendants made up their claim is contained in Ex. V, and I must say that that appears to be a not very honest attempt to get back from the plaintiffs the sum the defendants had had to pay the plaintiffs in respect of the difference of freight on that portion of their goods which was unshipped on the 22nd June. The plaintiffs disputed that account, but the defendants contended that it was quite correct, and the plaintiffs, having already under protest paid the sum demanded, had to remain silent. I need not say anything more about this account; for, when this suit was filed, the defendants or their legal advisers saw at once that it could not be relied on as the basis of their defence, and threw it overboard altogether, adopting an entirely different basis of calculation of the amount for which they claimed a lien. In the written statement, para. I, the de-

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fendants claim a lien for £520 17-3 for freight and demurrage, and pay into Court the equivalent of £ 2-8-2, the difference between that sum and £523-5-5, the amount claimed in the account (Ex. 6). The sum of £520-17-3 seems to be made up of £83-7-1 demurrage claimed in V[1] and £437-9-11, difference of freight as shown in the account (Ex. 14). As regards the demurrage as between the plaintiffs and the defendants, the latter were not justified in claiming it. The charter-party provided that demurrage was to be paid day by day in cash. This was not done, but before the captain left the defendants wrote him a letter, A[4], in which they acknowledge that they were responsible to the owners for the demurrage then due, and that letter was acknowledged by the captain. How, then, could the owners go behind the act of their agent and contend that they had a lien for demurrage? Much less could the defendants when acting ostensibly on behalf of the owner claim a lien, which the owner had not, for a sum which they themselves had personally undertaken to pay. Consequently the plaintiffs are entitled to recover the amount they paid on this account.

Then as to the £437-9-11. Looking to Exhibits A[1] and A[3] I find that four large consignments were made by the S.S. "Paddington" under shipping orders given by the defendants for which bills of lading were signed at rates under 30s. Consequently a duty was under the charter-party cast upon them to pay the difference between the bill of lading freight and the chartered rate before the ship sailed. Now I think it would be a great encouragement to fraud and dishonesty if the Court were to allow the defendants (not being insolvents) as charterers to say that they will not pay themselves as ship's agents the amount which they so owe the ship, and then as ship's agents to turn round upon a shipper who had no bill of lading, and say that they claimed a lien on his goods as ship's agents for the amount so unpaid by them as charterers. My present impression is that, if it were necessary to decide this point, I should hold that the defendants as charterers (being solvent) must be taken to have paid what they owed to themselves as ship's agents before the steamer sailed. It is not, however, necessary for me to decide this point, as it seems to me that the defendants have paid what was due to the

ship. The £437-9-11 mentioned in No. 14 as the amount due to the owners is transferred to No. 15 and is there shown to be equivalent to Rs. 6,601-1-0, and by the same account it appears that the defendants had at the time of the sailing of the "Paddington" a claim against the owners of Rs. 7,513-1-9, and that they actually set off the claim of the owners against them against this claim of theirs against the owners. So that, at the time the "Paddington" started, there was nothing due in respect of freight for which the owners could claim a lien. This fact accounts for the defendants in A8 refusing to furnish the plaintiffs with a copy of their disbursement account with the owners, although asked for it in Exhibit A7. It also shows that the statement of the defendants in Z, that they had sent the money received from the shippers by the "Paddington" and another steamer to the owners was untrue as to the "Paddington" at any rate, for, No. 15 shows that nothing was sent to the owners because nothing was due, the whole of the £437-9-11 having been, as I have shown, paid by them in another way before that sum was received from the plaintiffs. Under these circumstances, it appears to me that this claim against the plaintiffs was simply an unrighteous attempt on the part of the defendants to get the payment by the plaintiffs of what they were bound to pay, and had actually in account paid, the owners. Consequently I also hold that the plaintiffs are entitled to recover from the defendants the equivalent of £437-9-11 which has undoubtedly remained in their hands from the time it was paid by the plaintiffs on the 29th June up to the present time.

It is not necessary to determine whether the plaintiffs were entitled to raise issues 11–16, because I have practically found issues 11–15 against them and issue 16 is now immaterial, because no claim is made for dead freight. It is also not necessary, in my opinion, to discuss the question at length, whether the plaint discloses any cause of action; because, after the conclusions I have come to in this judgment, I am of opinion that, after striking out paragraph 3, there is still a good cause of action disclosed in the plaint.

The result of this judgment is that the decree of the Court below will be confirmed so far as the amount awarded to the plaintiffs is concerned and costs, but it must be varied by strik-

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ing out the words "and this Court doth declare that this decree is without prejudice to the right of the plaintiffs, if any, to recover the difference between the amount of the freight on 2,100 tons at the rate of 16*s.* 6*d.* per ton and at the rate of 30*s.* per ton by virtue of their protest." If it is part of the same cause of action as that upon which this suit is founded, then the plaintiffs have relinquished it, and, under section 43 of the Civil Procedure Code, cannot sue upon it again; if it is not, then no reservation is required, and no section of the Code has been pointed out which authorizes such a reservation. This deletion of the reservation of the plaintiffs' rights will, however, not affect them in any way, should they be advised to bring a suit in respect of the reserved matter. The appellants must pay all the costs of this appeal.

Attorneys for appellants (defendants):—Messrs. *Crawford, Brown and Co.*

Attorneys for respondents (plaintiffs):—Messrs. *Craigie, Lynch and Owen*

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *January* 17.

MARUTI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* KRISHNA AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Limitation Act (XV of 1877), Art. 179—Mortgage—Redemption—Decree for redemption—No time fixed in the decree for payment—Execution—Limitation.

On the 27th June, 1885, a consent-decree was passed in a redemption suit to the following effect:—

"Plaintiffs should pay the sum of Rs. 733 to the defendants within a month of this date; in case they do not pay the money, then in the year in the month of Chaitra in which they pay the money, the defendants should give back to them possession of the land; till that time the defendants should pay the Government assessment and enjoy the produce in lieu of interest."

On 27th June, 1897, plaintiffs applied for execution of the decree, praying for possession alone on the ground that the redemption money had been paid off by their payments of assessment, &c., on behalf of the defendants.

Held, that the application for execution was time-barred under article 179 of the Limitation Act (XV of 1877). The words of the decree were vague and indefinite, and were to be considered as really mentioning no time for payment.

* Second Appeal, No. 516 of 1898.

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The decree was, therefore, to be taken as operating from its date, and to be enforceable only within three years from that time, unless kept alive by application for execution made according to law within the prescribed periods.

SECOND appeal from the decision of Ráo Bahádur Chunilal Maneklal, First Class Subordinate Judge, A. P., of Sátára.

In 1883, plaintiffs filed a suit for redemption of a mortgage. In this suit a consent-decree was passed on 27th June, 1885, which provided as follows:—

"The plaintiffs should pay the sum of Rs. 733 to the defendants within a month from this date. In case they do not pay, then, in the year in the month of Chaitra in which they pay the money, the defendants should give back to them possession of the land; till that time the defendants should pay the Government assessment and enjoy the produce in lieu of interest."

On the 27th June, 1897, plaintiffs gave a *darkhást* for execution of the decree, praying for possession of the property mortgaged, on the ground that the redemption money had been paid off by their payments of Government assessment, &c., on behalf of defendants.

The Subordinate Judge of Islámpur rejected the *darkhást* as being time-barred.

On appeal, the Subordinate Judge, A. P., was of opinion that the case was governed by article 178 of the Limitation Act (XV of 1877), and that "the right to apply for execution would accrue to the mortgagor on payment of the mortgage-debt in any year in the month of Chaitra." He, therefore, held that the *darkhást* was not time-barred. Accordingly he reversed the decision of the Court of first instance, and directed execution to proceed according to law.

Against this decision defendants preferred a second appeal to the High Court.

D. A. Khare for appellants.

N. G. Chandavarkar for respondents.

PARSONS, J.:—The decree in this case provides that "the plaintiffs should pay the sum of Rs. 733 to the defendants within a month of this date; in case they do not so pay, then, in the year in the

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month of Chaitra, in which they pay the money, the defendants should give back to them possession of the land; till that time the defendants should pay the Government assessment and enjoy the produce in lieu of interest." This decree, which was a consent-decree, was passed on the 27th June, 1885. The plaintiffs on the 27th June, 1897, presented this *darkhást* for execution, asking for possession alone, alleging that the money ordered to be paid had been paid off by their payments of assessment, &c., for the defendants. The Judge of the lower appellate Court, applying article 178 of Schedule II of the Limitation Act, has held the *darkhást* to be in time, as "the right to apply would accrue to the mortgagor on payment of the mortgage-debt in any year in the month of Chaitra." We feel, however, that there is one great obstacle to the application of article 178, which applies only to applications for which no period of limitation is provided elsewhere in the schedule, and that there is no reason why article 179 should not apply. The decree directs payment to be made within a month or at a time in succeeding years without mentioning any limit for that time or directing foreclosure in default of payment. It must, therefore, be taken as operating from its date and to be enforceable only within three years from that time unless kept alive by applications for execution made according to law within the prescribed periods. In so holding we are, we consider, simply following the decisions of this Court in the cases of *Gan Savant* v. *Narayan*[1], *Maloji* v. *Sagaji*[2] and *Narayan* v. *Anandram*[3]. We can see no difference between a decree which says "the money shall be paid" and one that says "the money shall be paid in future years" Both are equally indefinite and must be considered as really mentioning no time for payment, so that recourse must be had to the Limitation Act in order to ascertain the time. We, therefore, reverse the order in execution of the lower appellate Court and restore that of the Court of first instance, with costs on the plaintiffs throughout.

Order reversed.

(1) (1883) 7 Bom., 467. (2) (1888) 13 Bom., 567.
(3) (1891) 16 Bom., 480.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

JESANG (ORIGINAL PLAINTIFF), APPELLANT, v. A. T. WHITTLE (ORIGINAL DEFENDANT), RESPONDENT.*

1899. *January* 19

Easement—Right of way—Change of use—Indian Easements Act (V of 1882), Sec 23—Increase of servitude

Under section 23 of the Indian Easements Act (V of 1882) a right of way enjoyed for agricultural purposes may be used for the purposes of a factory, provided no additional burden is thereby imposed on the servient heritage.

SECOND appeal from the decision of Ráo Bahádur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad.

Suit for an injunction.

Plaintiff and defendant were owners of two adjoining fields. The defendant had a right of way over plaintiff's field for the purpose of carrying agricultural produce from his field on to the public road.

In 1893 the defendant erected a ginning factory on his land and began to use his right of way over the plaintiff's land for the purpose of conveying goods to and from his (defendant's) factory.

Thereupon the plaintiff brought the present suit to restrain the defendant from using the way across his field for this purpose.

The Court of first instance granted an injunction restraining the defendant from using the right of way over plaintiff's land for any other than agricultural purposes.

In appeal the First Class Subordinate Judge held that the defendant had a right of way over plaintiff's land for all purposes. His reasons were as follows:—

"The lower Court has allowed defendant's way through the disputed land for agricultural purposes only in reference to Survey No 699. I think section 13 of Act V of 1882, referred to by the lower Court, does not apply to the present case. It is admitted that defendant has set up a ginning factory in Survey No 699. The lower Court's decree, therefore, denies defendant's right of way for the purpose of the factory. But the Land Revenue Code allows an agricultural land to be used for other than agricultural purposes also. The way to Survey No. 699 should, therefore, be for all purposes allowed by the Land Revenue Code. No

* Second Appeal, No. 448 of 1897.

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addition al burden is thrown on plaintiff by using the road for factory purposes. Under section 22 of Act V of 1882 defendant can use the way in the mode least onerous to plaintiff. Plaintiff should determine a part of Survey No. 700 for defendant's way to No. 699, and then defendant under section 23 of the Act can use the way for the factory purposes also."

Against this decision plaintiff preferred a second appeal to the High Court.

N. G. Chandavarkar for plaintiff:—Defendant had a right of way over plaintiff's land for agricultural purposes only. He has a right to use this way for carrying goods to and from his factory. A right of way for one purpose does not include a right of way for any other purpose—*Wimbledon and Putney Commons Conservators* v. *Dixon*[1]; *Bradburn* v. *Morris*[2].

Ganpat Sadashiv Rao for respondent:—Under section 23 of the Easements Act (V of 1882) a dominant owner can alter the mode of enjoying the easement, provided he does not impose thereby any additional burden on the servient tenement. In this case it is found by the lower Court that no additional burden is thrown on plaintiff's land by using the road for factory purposes. That being so, the injunction sought was rightly refused—*Great Western Railway Co.* v. *Cefn Cribbur Brick Co.*[3].

PARSONS, J.:—The fact that the Land Revenue Code allows agricultural land to be used for other than agricultural purposes does not, as the Subordinate Judge, A. P., has supposed, permit of a right of way being used for all purposes allowed by the Land Revenue Code. Section 23 of the Indian Easements Act, 1882, is express upon this point, enacting, as it does, that "the dominant owner may, from time time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage." This only follows the law as declared by judicial decisions in the cases of *Wimbledon, &c., Commons Conservators* v. *Dixon*[1] and *Bradburn* v. *Morris*[2], *viz.*, "the rule is that the owner of the dominant tenement cannot, by changing the character of the occupation of the land in respect of which the right of way or easement exists,

(1) (1875) 1 Ch. D., 362. (2) (1876) 3 Ch. D., 812.

(3) (1891) 2 Ch., 157.

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impose a greater servitude upon the owner of the servient tenement." In the present case the defendant has set up a cotton press upon the survey number which before was used for agricultural purposes only, and wishes to employ the previously existing right of way for the purposes of the press. The test to be applied is to see whether any additional burden has or will be imposed on the servient heritage of the plaintiff by the use made or sought to be made of the way by the defendant. There has been no inquiry made upon this point, and an incidental remark only about it is made in the judgment of the lower Court. We ask the Judge of the lower appellate Court to find on the issue embodied in these words after taking evidence, and to certify to this Court his finding thereon within two months.

Issue sent back.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899.

January 23.

PURUSHOTTAM AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* ATMARAM JANARDAN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Partition—Two suits for—First suit for partition of family property—Second suit for partition of property held jointly by famil and others—Vritti—Civil Procedure Code (Act XIV of 1882), *Secs.* 13 *and* 43—*Practice.*

A suit brought by some members of a family against the other members of the same family for partition of the joint family property does not preclude a second suit by the same plaintiffs for partition of other property belonging jointly to their family and strangers.

SECOND appeal from the decision of J. B. Alcock, District Judge of Násik.

The plaintiffs and the first six defendants were members of the Parashare family, and as such they were joint owners of a certain *vritti*, called the Parashare *vritti*. They also owned jointly with another family, *viz.*, the Khandve family, a certain other *vritti* called the Khandve-Parashare *vritti*.

* Second Appeal, No. 323 of 1898.

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PURUSHOTTAM v. ATMARAM.

In 1881 the plaintiffs (as members of the Parashare family) sued (Suit No. 207 of 1881) the first six defendants (also Parashares) for partition of the Parashare *vritti* and other joint family property, obtained a decree, and recovered their share.

The plaintiffs now brought this suit against the other members of their family (defendants Nos. 1 to 6) and the members of the Khandve family (defendants Nos. 7 to 14) for a partition of the Khandve-Parashare *vritti*. The defendants Nos. 1 to 6 contended that as against them the suit was barred by the former suit, inasmuch as the claim now made ought to have been included in it —section 43 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge disallowed the defendants' contention and passed a decree for the plaintiffs.

On appeal by defendants Nos. 1 to 6 the District Judge reversed the decree and dismissed the suit, holding that it was barred by sections 13 and 43 of the Civil Procedure Code (Act XIV of 1882).

The plaintiffs filed a second appeal.

Daji A. Khare for the appellants (plaintiffs).

N. G. Chandavarkar for the respondents (defendants).

PARSONS, J. —There was a *vritti* owned jointly by the family of the Parashares and there was a *vritti* owned jointly by the families of the Parashares and the Khandves. The plaintiffs are Parashares, and in 1881 they sued the defendants Nos. 1 to 6 (who are also Parashares) for partition of their joint *vritti* and got a decree, and the *vritti* was divided between them. The plaintiffs have now sued the defendants Nos. 1 to 6 and the defendants Nos. 7 to 14 (who are members of the Khandve family) for a partition of their joint *vritti*. The District Judge thinks that the suit is barred by the provisions of sections 13 and 43 of the Civil Procedure Code. We are unable to agree with him. Section 13 cannot apply, for the parties are not the same. Section 43 applies only to claims arising out of the same cause of action. It cannot be said that the claim of the plaintiffs to obtain their share of property owned jointly by them and B is founded on the same cause of action as their claim to obtain the share of property owned jointly by them and B and C. If the cause of action is founded

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on a refusal on the part of the defendants to divide, then the refusal in each case is that of different persons owning different rights. If it is founded on the right to claim a partition of what is joint, then the subject-matter is different, for the joint property of A and B is not the joint property of A, B and C. Joint family property is the property owned by one family (*familia*) jointly among its own members, and the decision in *Ukha* v. *Daga*[1] was passed in reference to such property only Property which is held jointly by several families not the joint family property of each of those families so that it would be compulsory upon each of them, in suing its own member for a partition of their family property, to include it in that suit, or else not be allowed afterwards to sue for its share therein. Section 43 lays down no such rule of law as this. If it did, then this suit would have to include all the joint property of the Khandve family, and it that included property owned by it and other families, the members of those families and all their joint property would also have to be included, the result would be disastrous. We reverse the decree of the lower appellate Court on this preliminary point and remand the appeal for disposal on the merits. Costs to be costs in the cause.

RANADE, J.:—The appellants, original plaintiffs, brought this suit to obtain a partition of their share in a joint *vritti* belonging to the Parashares (represented by the appellants and respondents Nos. 1—6) and the Khandves (represented by the respondents Nos. 7—14). There had been a previous partition suit between the appellants and their bhaubands, the respondents Nos. 1—6, in respect of a division of the joint family property consisting of houses, lands and the Parashare *vritti*, and respondents (defendants) Nos. 1—6 contended that the present suit for a partition of the joint Parashare and Khandve *vritti* was not maintainable under section 43 of the Civil Procedure Code, as the appellants should have included their present claim in the old suit. The other respondents, Nos. 7—14, representing the Khandves did not raise any objection on this ground to the appellants' claim

The Court of first instance overruled this objection of respondents Nos 1—6, but the lower appellate Court held, chiefly on

(1) (1882) 7 Bom., 182.

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the authority of the ruling in *Ukha* v. *Daga*[1], that the objection was fatal to the appellants' claim under the combined operation of sections 13 (ii) and 43 of the Code. The point for consideration is whether the present claim for the partition of the joint Parashare-Khandve *vritti* was properly rejected by reason of its not having been included in the previous partition suit of the Parashare *vritti*.

It appears to me quite clear that the lower Court of appeal was in error in holding that the precedent in *Ukha* v. *Daga* governed this case. The facts of that case were that the joint family property consisted of lands and debts, and the plaint in the previous suit claimed a division of the debts only, and alleged that the rest of the joint property had been divided. Under these circumstances, it was very properly held that a subsequent suit for the division of the lands could not be maintained under section 43 of the Code. In the present case there was no such allegation. The old suit was confined to the division of the property jointly owned by the Parashare family, including the *vritti* exclusively belonging to the Parashares. The present suit relates to a division of a *vritti* owned in partnership by the Parashares and the Khandves, the latter entire strangers to the Parashares in respect of family relationship. This claim against the Khandves could not have been joined in the old suit for a family partition without infringing the provisions of sections 28, 29 and 41 of the Code about the misjoinder of parties and of subject-matters.

As laid down in *Hari* v. *Ganpatrav*[2], the rule that every partition suit shall embrace all the joint family property is subject to certain exceptions such as (1) where different portions of it are situated in and out of British India—*Ramacharya* v. *Anantacharya*[3]; (2) where a portion of it is not immediately available for partition by reason of its being in the possession of mortgagees, or because it was inám land which required Government permission to give Courts jurisdiction— *Narayan* v. *Pandurang*[4], *Balkrishna* v. *Hari*[5] and *Pattaravy Mudali* v. *Audimula Mudali*[6].

(1) (1882) 7 Bom., 182.
(2) (1883) 7 Bom., 272.
(3) (1893) 18 Bom., 389.
(4) (1875) 12 Bom. H. C. Rep., 148.
(5) (1871) 8 Bom. H. C. Rep., 64.
(6) (1870) 5 Mad. H. C. Rep., 419.

A third class of cases may be similarly excepted from the rule, where, as in the present case, property is held in partnership by the joint family along with strangers, who have no interest in the family partition among the sharers, and who could not, therefore, be made parties in the family partition suit. The case of *Gavrishankar* v. *Atmaram*(1) clearly shows that such cases are possible, and that the mere circumstance that a partition has been effected, does not by itself, in the absence of an agreement to that effect, bar the right for partition of property still undivided, and in respect of which the members retain their status of sharers in an undivided estate. A whole village or a particular community may have joint property in a right of common pasturage or a forest, and such common enjoyment may continue even after there has been a private partition among the members of any one or more of the component families. No intention to relinquish a part of the claim can be inferred by the mere non-inclusion of such a common claim in a family partition suit. The position laid down in *Moonshee Buzloor Ruheen* v. *Shumsoonnissa Begum*(2) has been subsequently explained by their Lordships of the Privy Council in *Pittapur Raja* v. *Suriya Rau*(3). In the first of these two cases, it had been laid down that the correct test (for the application of section 7 of the old Code, now section 43 of the present Code) was whether the new suit is founded on a cause of action distinct from that which was the foundation of the old suit. This was further explained in the later case. Section 7 does not require that every suit shall include every cause of action, or every claim that a party has, but only that every suit shall include the whole of the cause of action for which the suit was brought—*Mothoor Mohun Mundul* v. *Khemunkuree Dossee*(4). The cause of action, *i. e.*, the fact or facts which afforded ground for complaint in the family partition suit was plaintiffs' relationship in the family of the Parashares. The cause of action in the present suit was the partnership between the Parashares and Khandves. The causes of action being thus distinct, neither section 13 (ii) nor section 43 can have any operation here. This was the principle on which second suits were held not to be barred by the previous litigation in the following cases—*Maria-*

(1) (1893) 18 Bom., 611.
(2) (1867) 11 Moo I. A., 553.
(3) (1885) 8 Mad., 520.
(4) (1866) 5 Cal., W. R., 182.

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thodi v. *Appu* [1]; *Pittapur Raja* v. *Suriya Rau* [2]; *Ramhurry Mondul* v. *Mothoor Mohun Mondul* [3].

One rough test to determine whether the cause of action is the same or distinct, is to see if the same evidence supports both claims—*Soorasoonderee Dabea* v. *Golam Ali* [4]. It is clear that, judged by this test also, the present suit is not barred by reason of the previous litigation.

For the several reasons set forth above, we hold that the District Judge was in error in dismissing the claim. We reverse his decree and remand the case back to him for disposal on the merits.

Decree reversed and case remanded.

(1) (1892) 15 Mad., 296
(2) (1895) 8 Mad., 520
(3) (1873) 20 Cal., W. R., 450.
(4) (1873) 19 Cal., W. R., 141.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899.
January 23.

KOMARGOWDA (ORIGINAL PLAINTIFF), APPELLANT, *v.* BHIMAJI KESHAV AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Service lands—Mere non-performance of service does not make the holding adverse—Adverse possession—Limitation—Resumption.

Where lands are held as remuneration for services, the fact that no services have been performed does not of itself make the holding adverse. To make the holding adverse there must be a refusal to perform service or a claim to hold the lands free of service.

SECOND appeal from the decision of L. Crump, Assistant Judge of Dhárwár.

Plaintiff was the desái of the Narendra Mahál.

In 1893 he brought this suit to recover possession of certain lands forming part of his *deshgat inám* lands. He alleged that his ancestors had assigned these lands to the ancestors of defendant No. 1 as remuneration for services to be rendered in connection with the office of *mutalik* or deputy of the desái; that up

* Second Appeal, No. 391 of 1898.

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to 1882 these services had been rendered from time to time by the defendant's family, but that latterly defendant No. 1 had refused to perform any services, and was, moreover, unfit to perform them. He claimed that he was, therefore, entitled to resume the lands. Defendant No. 1 pleaded (*inter alia*) that his ancestors had held the lands uninterruptedly for nearly 200 years; that the suit was time-barred; that he was unaware that any services were attached to the land, that the plaintiff had never demanded performance of service; and that he was willing to perform any services which the Court might direct.

The Subordinate Judge held that the lands in suit formed part of plaintiff's *deshgati* vatan that they had been held and enjoyed by the first defendant's family as remuneration for services rendered by them as *mutalika* of the desái, and that such services had been duly performed up to 1882-83. The suit was, therefore, not barred by limitation.

He passed a decree in plaintiff's favour, awarding possession of the lands.

On appeal, the Assistant Judge agreed with the Subordinate Judge in holding that the lands in dispute originally belonged to the plaintiff's family; that they had been assigned to the family of defendant No. 1 for services to be rendered as *mutaliks* of the desái; and that they had always been treated as forming part of the plaintiff's *deshgat inám* lands. He found, however, that defendant No. 1 had held the lands without rendering any service for over thirty years, and was of opinion that his possession had become adverse, and that the plaintiff's claim was, therefore, time-barred. He accordingly reversed the decree of the Subordinate Judge and dismissed the suit.

Against this decision, plaintiff preferred a second appeal to the High Court.

Inverarity (with him *Manekshah Jehangirshah*) for appellant.

Branson (with him *N. G. Chandavarkar*) for respondents.

PARSONS, J.:—The current findings of the lower Courts are that—

1, the lands in suits originally formed part of the plaintiff's *deshgat inám* lands;

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2, they were assigned by the ancestors of the plaintiff to the ancestors of the first defendant for services to be rendered by the latter to the former.

The lower appellate Court, however, differing from the Court of first instance, found that the suit to recover possession of the lands was time-barred. In coming to this conclusion, the Assistant Judge has held that the mere non-render of any service made the possession of the defendant adverse. This is clearly incorrect. The lands were held for service, and the fact that no service was performed would not of itself make the holding adverse. In this respect, render of service is on the same footing as payment of rent, and the principle laid down in the cases of *Dadoba* v. *Krishna*(1) and *Budesab* v. *Hanmanta*(2) would be applicable. To make the possession of such lands adverse, there must be a refusal to perform service, or a claim to hold the lands free of service. The Subordinate Judge has shown conclusively that the defendant continued to serve as pátil on behalf of the plaintiff up to 1882-83, and that no refusal to serve was made till after that time, and his decision on the point of limitation is undoubtedly correct.

In this connection, I notice the Exhibit 256, which is a document passed by the first defendant to the plaintiff on the 24th July, 1880. In it the defendant states that the lands in dispute and others formed a part of the *chavrat* lands of the plaintiff's *deshgati vatan* of Narendra Mahál and were continued to him (first defendant) as remuneration for doing *mutaliki* service, and that he was liable accordingly to perform the service directed by the plaintiff by paying Rs. 100 as judi per annum for those lands, and he further states that not having performed the said service or paid the judi so long regularly and from time to time, and having humbly represented to the plaintiff that he would not thenceforth commit such default or act in such a way, and the plaintiff having agreed to appoint him to the office of pátil of Narendra on condition of his regularly paying the judi of the lands in question as before, he proceeds to execute this karár-patra with his free will and consent with an agreement to per-

(1) (1879) 7 Bom., 34 at p. 39. (2) (1896) 21 Bom., 509 at p. 516.

form thenceforth the aforesaid duties with ability and pay the judi regularly as stated above. This was admitted in evidence by the Subordinate Judge, but rejected by the Assistant Judge on the ground that it was not registered. I do not think that it is a document that required registration. It is merely a statement of past facts with a promise for the future to act in accordance therewith. No interest in immoveable property is declared, and no new rights or obligations are created by it. The document was admissible in evidence. The Assistant Judge says of this document that, if admissible, it makes it quite clear that service was actually performed. It shows further, I think, that service was admitted and promised to be performed, and that there was no adverse possession.

It only remains to notice the fourth issue, which related to the particular relief, out of those claimed, to which the plaintiff might be entitled. This was fully dealt with and found upon by the Subordinate Judge who awarded possession, but was only discussed by the Assistant Judge on account of his finding on the point of limitation. I am unable, therefore, to accept the opinion of the latter on the point. I think there should be a fresh finding thereon by the lower appellate Court after a full consideration of the evidence of the plaintiff himself (as to demand of service) and of the conduct of the defendant which will be found fully set out by the Subordinate Judge at page 11 of the paper book. We, therefore, ask the Judge of the lower appellate Court to record a fresh finding on his fourth issue and certify it to this Court within two months.

RANADE, J.:—The appellant, desái of Narendra Mahál in Dhárwár, brought this suit for the resumption of certain lands granted as remuneration for service as *mutalik* desái by appellant's ancestors to the ancestors of respondent No. 1. The resumption was sought on the ground that respondent No. 1 had become unfit for such service, and refused to render service though asked to do so in 1882. There was also an alternative claim for rent and judi and local cess for three years. Respondent No. 1 claimed to be in possession of the lands for over 150 years, and stated that he was not aware that any service had to

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demanded of him, and said that he was ready to render service if it was proved that he was bound to do so. He finally denied any liability to pay rent or judi or local cess.

The second respondent and other defendants claimed title under respondent No. 1. The Court of first instance decreed the appellant-plaintiff's claim, holding that the lands were held by respondent No. 1 on service tenure, and that as respondent had refused to render such service, appellant had a right to resume possession of the lands. In appeal, the Assistant Judge found that the lands in dispute belonged to the desái; that they were assigned by his ancestors to respondent No. 1's ancestors in connection with, and as remuneration for, the office of *mutalik* desái; that respondent's ancestors rendered *mutalik* service thirty years ago, and respondent No. 1 himself officiated as pátil ten years before the suit. He, however, held that this last duty was not performed as *mutalik*, and that as respondent No. 1 had enjoyed the lands without rendering any service for thirty years, respondent's possession was adverse to the appellant, and barred the claim. Finally, the Assistant Judge held that there was no evidence of demand and refusal. The claim was accordingly dismissed.

The principal point for consideration is the question of limitation. There can be no doubt that the Assistant Judge was in error in holding that the mere non-rendering of service for thirty years under the circumstances stated by him constituted adverse possession of the lands so as to bar appellant's claim. It has been repeatedly held that mere non-payment of rent by a tenant to his landlord does not constitute his possession adverse to the landlord. When the relationship of landlord and tenant has been established, mere non-payment of rent, though for many years, is not sufficient to show that the relationship has ceased. There must be affirmative proof to that effect—*Rungo Lall* v. *Abdool Guffoor*[1] and *Poresh Narain* v. *Kassi Chunder*[2]. In the first case, rent had not been paid for over fifteen years, and a rent suit had been actually withdrawn. The same position was laid down by this Court in *Gangabai* v. *Kalapa*[3], where

(1) (1878) 4 Cal., 314. (2) (1878) 4 Cal., 661.
(3) (1885) 9 Bom., 419.

the landlord had been inámdar of the land, and the inám had been resumed in 1858, and the tenants, who claimed to hold the lands under a permanent lease from the inámdár, continued in possession after the resumption for over twenty years. The Madras High Court has followed the same ruling in *Rungo Lall* v. *Abdool Guffoor*[1] in *Tiruchuria* v. *Sanguvien*[2]. The mere fact that the lands in dispute are held on service tenure makes no change in the relationship of landlord and tenant: section 105 of the Transfer of Property Act expressly classes service with money or grain rents. The rulings in regard to rents apply with equal effect to service tenure lands. In *Easwara Doss* v. *Pungavanachari*[3], the zamindár's right to resume lands held on service tenure was upheld. The portion of the judgment, which relates to the point of limitation, bears intimately upon the point now under consideration. The Assistant Judge has not found that there has been, over and above the omission to render service, any active assertion of an adverse right on the part of the respondent. On the contrary, he has expressly found that service was regularly rendered thirty years ago, and some service was rendered within ten years previous to the suit. So far from asserting any adverse right, the respondent has expressed his readiness to serve, if it is proved that he is bound to do so. The document, Exhibit 256, excluded for want of registration, may be referred to show that the service as pátil was a part of the *mulaliki* duties. Under these circumstances, we must hold that the respondent's possession has not been adverse, and that the claim is not barred by limitation.

The statement in the judgment of the Assistant Judge, that there was nothing to show any demand and refusal in this case, was challenged by Mr. Inverarity, counsel for the appellant. The lower appellate Court laid down no issue on this point, and the Court of first instance has expressly found that there was a wilful default on the part of the respondent in the matter of service. In deciding questions about the resumptions of lands held on service tenure, the general principles to be observed have

(1) (1878) 4 Cal., 314 (2) (1881) 3 Mad., 118.

(3) (1890) 13 Mad., 361.

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been laid down in *Forbes* v. *Meer Mahomed Tuquee*[1], followed in *Sitaramarazu* v. *Ramachendrarazu*[2]. It is desirable that a clear finding should be recorded on the point before the right to claim resumption is enforced. The appellant asserts that he made a demand and that respondent refused to render service. The respondent directly challenges this position. We must, therefore, send down an issue and require the Assistant Judge to find whether there has been such a demand and refusal as to entitle the appellant to claim resumption of the possession of the lands in dispute.

(1) (1870) 13 M. I. A., 438 (2) (1881) 3 Mad., 367

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *January* 30.

YAMUNABAI (ORIGINAL DEFENDANT), APPELLANT, *v.* MANUBAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Maintenance—Maintenance of daughter-in-law—Claim of daughter-in-law against self acquired property of her father-in-law in hands of his heirs.

The widow of a predeceased son, who lived in union with his father, has a legal right to maintenance from her mother-in-law out of the self-acquired property of the father-in-law to which his widow has succeeded as his heir. A son's widow has no legal claim for maintenance against self-acquired property in the hands of her father-in-law, but when such property devolves upon his heirs, the daughter-in-law has a claim against it in their hands for maintenance if her husband had lived in union with his father.

APPEAL from an order passed by Ráo Bahádur V. M. Bodas, First Class Subordinate Judge of Sholápur, with appellate power.

Suit against a mother-in-law for maintenance. The plaintiff's husband Tatia was the son of the defendant and her husband Bala. Tatia had lived in union with his father Bala, but had died before him. Bala subsequently died, leaving no surviving issue, and his property went to his widow, the defendant. The plaintiff now sued the defendant for maintenance.

The Subordinate Judge found that the property left by Bala was his self-acquired property and that the plaintiff had, therefore, no right to maintenance out of it. He dismissed the suit without finding on the other issues in the case.

* Appeal No 24 of 1898 from order.

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On appeal, the Judge reversed the decree and remanded the case for a finding on the other issues.

The defendant appealed against the order of remand.

Daji Abaji Khare for appellant (defendant).

There was no appearance for the respondent (plaintiff)

RANADE, J.:—The question of Hindu law raised in this appeal is whether the widow of a predeceased son, who lived in union with his father, has a legal right to claim maintenance from her mother-in-law when the latter succeeds as heir to her husband, who left only self-acquired property at the time of his death.

The principle that a son's widow has no legal claim for maintenance against the self-acquired property in the hands of her father-in-law, has been affirmed in a series of decisions by this Court, as also by the other High Courts of Bengal, Madras and Allahabad—*Savitribai* v. *Laximibai* [1]; *Khetramani Dasi* v. *Kashinath Das* [2]; *Ganga Bai* v. *Sita Ram* [3], *Janki* v. *Nand Ram* [4]; *Kalu* v. *Kashibai alias Lakshmibai* [5]. The obligation to maintain the widowed daughter-in-law in such cases has been held to be only a moral and imperfect obligation, not enforceable in law. As against the father-in-law, the right of the son's widow to be maintained rests, not on her husband being a co-member of a joint family, but on being a joint owner of ancestral property with his father—*Mussamut Hema Kooeree* v. *Ajoodhya Pershad* [6]; *Savitribai* v. *Laxmibai* (*supra*); *Musammat Lalti Kuar* v. *Ganga Bishan* [7]; *Devi Persad* v. *Gunuanti Koer* [8].

While the nature of the claim of a widowed daughter-in-law for maintenance by the father-in-law has been thus clearly defined, a distinction has been recognized by the High Courts of Bengal and Allahabad between the position of the father-in-law and those who succeed him as heir to his separate or self-acquired estate. The moral obligation of the father-in-law is held to be converted into a legal obligation when his self-acquired property devolves upon his heirs. Under certain circumstances and in the

(1) (1878) 2 Bom., 573.
(2) (1868) 2 Ben. L. R., 15.
(3) (1877) 1 All., 170.
(4) (1888) 11 All., 194
(5) (1882) 7 Bom., 127.
(6) (1875) 24 W. R., 471.
(7) (1875) 7 N. W. P. H. C. R., 261.
(8) (1895) 22 Cal., 410.

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hands of such heirs, such property is held liable to provide maintenance to the widow of a predeceased son of the person who acquired the property when such son lived in union with him. This principle was first laid down in Bengal, and has been more recently affirmed by the Allahabad High Court—*Rajjomoney Dossee* v. *Shibchunder Mullick*(1); *Janki* v. *Nand Ram*(2); *Kamini Dassee* v. *Chandra Pode Moudle*(3); *Devi Persad* v. *Gunwanti Koer*(4). This same distinction was recognized and given effect to in this Court in *Adhibai* v. *Cursandas*(5), where it was held that the self-acquired property of the father, when it descended to one of his surviving sons, was to be regarded as ancestral property, and as such subject to the obligations of ancestral property to provide maintenance to the widow of a predeceased son living in union with his father. The Allahabad High Court in *Janki* v. *Nand Ram* declined to subscribe to the view that such self-acquired property became ancestral in the hands of the original owner's heir, but rested the liability on the ground that the heir in such cases took the property for the spiritual benefit of the deceased owner, and so taking it, the old moral obligation was turned into a legal obligation which could be enforced. The Calcutta High Court rested this distinction on the ground that the heir in such cases is under a legal obligation to provide, out of the estate which descends to him, maintenance for the persons whom the ancestor was bound legally or morally to maintain, and the heir takes the estate, not for his benefit, but for the spiritual benefit of his ancestor—*Khetramani Dasi* v. *Kashinath Das*(6); *Devi Persad* v. *Gunwanti Koer*; *Kamini Dassee* v. *Chandra Pode Moudle* (*supra*). Though there is thus a divergence in the reasons given by this Court and by the Calcutta and Allahabad High Courts, the conclusion they arrive at is identical.

It was contended, however, that the mother-in-law did not take her husband's estate as ancestral property as her husband was not her ancestor, and the ruling in *Adhibai* v. *Cursandas* did not apply to the present case.

(1) (1864) 2 Hyde, 103.
(2) (1888) 11 All., 191.
(3) (1889) 17 Cal., 373.
(4) (1895) 22 Cal., 410.
(5) (1886) 11 Bom., 199.
(6) (1868) 2 Ben. L. R., 15.

It is plain that the obligation cannot safely be made to rest on the narrow ground on which it was made to rest in the judgment of Mr. Justice Farran in *Adhibai* v. *Cursandas*. It is true that in that particular case the property had descended to Cursandas, who was a son of the deceased owner, but this was a mere accident. The deceased Nathu left behind him a widow and two sons. If he had left no sons, the widow would have succeeded, and in such a case, it could not with propriety be contended that while the son of Nathu was bound to maintain his brother's wife, Nathu's widow was not under any obligation because the property had not devolved upon her from her ancestor. This was one of the reasons assigned by the Full Bench of the Allahabad High Court for dissenting from the reasoning, while accepting the conclusion of the Bombay ruling. In the case before the Allahabad High Court the defendants were a brother-in-law and the mother-in-law of the widow-plaintiff.

Quite independently of this circumstance, the word "ancestral" is in Sanskrit *pitrarjit*, and is opposed to *swarjit* or self-acquired. In the case of a widow or mother or sister succeeding as heir, the word *pitrarjit* would obviously be out of place. Ancestral property, as technically defined, means property transmitted in direct male line from a common ancestor, and the legal incidents attaching to it distinguish it from self-acquired property. If the property in the hands of the father was self-acquired down to the moment of his death, it could not, immediately after his death, become ancestral in the hands of his widow. The two incidents of self-acquired property, which are of importance, are (1) that partition cannot be enforced in regard to it by the sons, and (2) that the owner has unrestricted power of disposing of it by gift, or devising it by will. These incidents cease to attach to it when the owner dies without making any disposition. It then becomes the joint common property of the family, and all the sons share equally in it like any other ancestral property, and no purpose is served by calling it ancestral in the hands of the heirs. If the heir had been a testamentary devisee, the incidents of self-acquisition would protect such property even in his hands. Mr. Justice Farran referred to this circumstance in his judgment (page 207), and it is, therefore,

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clear that he did not mean to lay any special emphasis in his use of the word "ancestral," except to signify that it was inherited property. In the case of *Raijomoney Dossee* v. *Shibchunder Mullick* the liability is made to depend on the fact that the property descends to the heir. The burden is on the inheritance in the hands of the heir. In *Khetramani Dasi* v. *Kashinath Das* Sir B. Peacock observed that the obligation is on the heir, for the estate is inherited subject to the obligation of providing maintenance. Mr. Justice Farran quoted these observations with approval, and based his argument on them, and it is thus clear that no emphasis was meant to be laid on the fact of the self-acquired property becoming ancestral after the owner's death. There is thus no real divergence between the principles laid down by the three High Courts in regard to this liability. The mere fact that, in the present case, the heir is the mother-in-law of the widow, and not her brother-in-law, does not, therefore, as the appellant's pleader contended, distinguish this case from the ruling in *Adhibai* v. *Cursandas*. If the son's widow has a claim for maintenance against the unobstructed rights of a full heir, it cannot be maintained that her rights are not equally valid against the mother-in-law, whose interest is admittedly of a more restricted character.

It is not strictly necessary, in the view taken above, to notice the earlier decisions of this Court, especially the ruling in *Savitribai's case*, where a contrary view has been suggested, and the claim of the son's widow is made to rest, as in the Madras Presidency, solely on the fact of the existence of ancestral or joint property in which the widow's husband had an interest. The older decisions of this Court—*Chandrabhagabai* v. *Kashinath*(1); *Timmappa* v. *Parmeshriamma*(2); *Udaram* v. *Sonkubai*(3)—went to the length of resting the right of the widow to maintenance on the fact of her actual destitution, independently of all questions regarding union or separation, or the existence of ancestral or self-acquired property. All these earlier cases were exhaustively reviewed by Westropp, C.J., in *Savitribai* v. *Laximibai*, which

(1) (1866) 2 Bom. H. C. Rep., 323. (2) (1838) 5 Bom. H. C. Rep., 130 (A.C.J.)
(3) (1873) 10 Bom. H. C. Rep., 433.

was a Full Bench decision, and they were either overruled or distinguished, and it was finally laid down that the right of the son's widow depended on the existence of ancestral property, or property of which the widow's husband was owner. The facts in that case, however, clearly distinguish it from the present. There was no union of interests between the widow's husband and the defendants in that case. There had been a partition between the defendant (uncle) and the widow's husband. This distinction is important, for on it the legal claim of dependent members of a family who are entitled to maintenance really rests. Mānu enjoins the duty of supporting dependent members of the family. Narad enjoins the same duty[1]. So does Brihaspati quoted in Gurudas Bannerji's Lectures (Tagore Law Lectures, 1878, p. 210) The text of Sankha enjoins on the parent the duty of allotting maintenance to the childless wives of brothers and sons[2]. The widow-plaintiff in the case of *Savitribai* v. *Luximibai* was not a dependent female member of defendant's family, as there had been a partition between her husband and his uncle, the defendant. These and many more texts were noticed by Westropp, C. J., who, however, construed them as preceptive, and not mandatory. They would be preceptive in cases such as those of *Savitribai, i. e.,* widows of separated kinsmen, but where there was no separation, as in the present case, it would be straining the texts too far to hold them to be preceptive only. Westropp, C. J, in his judgment notices the text of the Mayukha, where the Guru (including father-in-law) is expressly enjoined to give maintenance to his son's widow where there was no separation of interests. This distinction of union or separation is thus very material, and the ruling in *Savitribai* v. *Luximibai* must be considered as specially limited to the circumstances of that case where the widow was the widow of a separated son or nephew. The right of female dependent members to be maintained out of the estate prevails even against the king who succeeds to the estate by escheat—*Mussumut Golab Koonwur* v. *The Collector of Benares*[3]. The considerations of natural equity and social justice, noticed by Mahmood, J., towards

(1) Jolly's Translation, Ch. 13. (2) Colebrooke, Vol. 2, 538.
(3) (1847) 4 M. I. A., 246.

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the conclusion of his judgment in *Janki* v. *Nand Ram*, seem also to be very appropriate in the case of the widow of a predeceased son dying in union with his father.

On the whole, therefore, we must hold that the respondent's right to claim maintenance must be allowed as against the appellant, her mother-in-law, as in her hands the property is subject to the legal obligation of maintaining the widowed daughter-in-law whose husband was united in interest with his father.

We dismiss the appeal with costs on the appellant.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr Justice Parsons and Mr Justice Ranade.

1899 *February* 9.

RAMCHANDRA VITHAL RAJADHIKSHA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SHEIKH MOHIDIN (ORIGINAL PLAINTIFF), RESPONDENT,*

AND

SHEIKH MOHIDIN (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMCHANDRA VITHAL RAJADHIKSHA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, Art. 134—Mortgage—Purchaser from mortgagee—Necessity of possession in order to validate transaction as against original mortgagor.

A person purchasing or taking a mortgage from a mortgagee believing that he is getting a good title must have possession of the property for the statutory period in order to validate the transaction as against the original mortgagor under article 134 of the Limitation Act (XV of 1877).

SECOND appeal from the decision of Thakurdas Mathuradas, Assistant Judge of Ratnágiri, amending the decree of Ráo Sáheb Vishvanath Vaikunth Vagh, Subordinate Judge of Vengurla.

Suit for redemption. The lands in question belonged to the Renges, who mortgaged them with possession to the Rajadhikshas in 1840, 1856, 1859. The Rajadhikshas divided the mortgaged lands among themselves, and Balaji Rajadhiksha in September and October, 1877, mortgaged his share of them to one Kamat (defendant No. 6). Balaji, however, retained possession, but, after

* Cross Second Appeals, Nos. 493 and 492 of 1898.

his death, his widow mortgaged the same lands again to Kamat (defendant No. 6), and gave him possession.

The plaintiff was the purchaser of the equity of redemption in these lands from the Renges, and in 1890 he brought this suit for the redemption of the mortgages of 1840, 1856 and 1859.

It was contended on behalf of Kamat (defendant No. 6) that the plaintiff could not recover possession of the land without paying off his two mortgages of 1877 as well as the earlier mortgages which he sought to redeem, and he relied on article 134 of the Indian Limitation Act (XV of 1877). The lower Courts disallowed this contention on the ground that Kamat had not obtained possession more than twelve years before suit, and held that the plaintiff might redeem the early mortgages without also redeeming the mortgages to Kamat.

The defendants appealed.

Ghanashám N. Nadkarni for appellants (defendants):—We knew nothing of the earlier mortgages. We are *bonâ fide* purchasers for value without notice. The plaintiff cannot take the land from us without paying what we have advanced on its security. Article 134 of the Limitation Act does not require that the purchaser should have possession from the date of the purchase. We took actual possession in 1883, but previously to that our mortgagors held possession under kabuláyat. Their possession was our possession—*Yesu Ramji* v. *Ballkrishna Lakshman*[1], *Maluji* v. *Fakirchand*[2].

H. C. Coyaji, for respondent (plaintiff):—The lower Courts have held that the defendant as mortgagee had no possession until 1883. That is a matter of fact, and the finding must be accepted. Article 134 does not apply except where possession has been enjoyed. It refers to a suit to recover possession. Possession is implied. Possession for twelve years gives the purchaser a right as against the original owner, but if the purchaser has not had possession for that term, the original owner need not regard the transactions at all—*Radanath* v. *Gisborne*[3]; *Muthu* v. *Kambalinga*[4].

(1) (1891) 15 Bom., 583.
(2) (1896) 22 Bom., 225.
(3) (1871) 14 Mad. I. A., 1.
(4) (1889) 12 Mad., 316.

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RAMCHANDRA v. SHIVKU MOHIDIN.

RANADE, J.:—Most of the points raised in these cross appeals were disposed of by us in the course of the arguments urged on both sides. Mr. Ghanasham, pleader for the appellants in Appeal No. 493, however, laid considerable stress on the point of limitation. The facts relating to this contention, as they have been found proved by the Courts below, may be thus briefly stated.

The lands in dispute were proved to have belonged to the Renges, who mortgaged them with possession to the Rajadhirakshas in 1810, 1856 and 1859 (Exhibits 115, 16, 147). The Rajadhirakshas divided the mortgaged lands among themselves, and Balaji Rajadhiraksha mortgaged his share in these lands and other property to the original defendant No. 6, Kamat, in September and October, 1877, under two separate deeds, Exhibits 309, 310, and the same Rajadhiraksha's widow passed a third mortgage-bond in January, 1883 (Exhibit 311). The lower appellate Court has found that the first two mortgages by Rajadhiraksha to Kamat were without transfer of possession till 1883, till which time the lands were in the possession of the Rajadhiraksha.

It was, however, contended on behalf of this appellant (original defendant No. 6) that he had a right to require the respondent-plaintiff, who sued for the redemption of the original mortgages effected by the Renges with the Rajadhiraksha, to redeem also the later two mortgages of 1877 effected by the Rajadhiraksha with Kamat. It was contended that under article 134 of the 2nd Schedule of the Limitation Act, Kamat was a purchaser for value from the Rajadhiraksha without notice of the prior mortgage, and as the mortgages of 1877 were passed more than twelve years before the suit of 1890, the respondent-plaintiff could not recover possession of the lands without paying these two Rajadhiraksha's mortgages as well as the earlier Renges' mortgages. A similar contention was raised on behalf of the other Kamat appellant, original defendant No. 16, whose mortgage-bond was passed in 1878. The lower appellate Court disallowed these contentions on the ground that as these two appellants did not obtain possession under their mortgages more than twelve years before suit, the respondent-plaintiff had a

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right to redeem the lands from the mortgage-debt of Renge's bonds without being subject, at the same time, to redeem Rajadhiaksha's mortgages.

Mr. Ghanasham contended that the lower appellate Court ought to have held that the two mortgages of 1877 of defendant No. 6 as also the mortgage of 1878 of defendant No. 16 were mortgages with possession, and that any how, as they were executed more than twelve years before the redemption suit, they were entitled to the protection of article 134 as being purchases for valuable consideration. His contention was that the limitation in such cases commences from the date of purchase (1877 and 1878), and that transfer of possession was immaterial, though in this case the Rajadhiaksha had passed rent notes on the date of mortgage-bonds. The lower appellate Court has relied chiefly on the authority of the ruling in *Maluji* v. *Fakirchand* [1], in which it was laid down that until the defendants held possession under their mortgage for the full period of twelve years, the plaintiffs could disregard their mortgage and recover possession, notwithstanding its existence, by paying off the original mortgage. When the defendants Nos. 2 and 3 (in that case) had held possession under it for twelve years, article 134, coupled with section 28, would validate it, and the plaintiff would be debarred from recovering possession disregarding the later mortgagee's mortgage.

In the present case, the possession of the Kamat appellants has not ripened into adverse enjoyment for twelve years, so as to validate their mortgages, in a way to bind the respondent-plaintiff to redeem them. The case, therefore, clearly falls within the scope of the ruling referred to above.

It was, however, pressed upon us that the wording of the article takes no account of possession and speaks only of purchase, and as the Kamat purchases were more than twelve years old, the want of actual possession by them before 1883 was of no consequence. It thus becomes necessary to consider this point more fully in reference to the principle given effect to by the judicial enlargement of the scope of article 134, and the deci-

(1) (1896) 22 Bom., 225.

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sions passed upon that article. Article 134 relates to suits for recovery of possession of immoveable property which is bequeathed or conveyed in trust or mortgaged, and is afterwards purchased from the trustee or mortgagee for a valuable consideration. In so far as the article refers to trustees, it must be read along with section 10, which also relates to trustees, and permits *cestui que trust* to follow trust property in the hands of trustees, or their assigns (excepting assigns for valuable consideration). This exception has obvious reference to the same class of considerations as are given effect to in article 131 in respect of suits for possession. Unless the assignee for valuable consideration has possession, it is plain that trust property cannot be followed into his hands, and similarly, unless the purchase is with possession, the mortgagor owner has no notice, and no means of knowing any breach of the trust, and no suit can lie for recovery of possession from the alienee. The purchase generally must, therefore, be with possession. More especially must this be the case where the purchase is a purchase *sub modo*, and is, in fact, a mortgage as in this case.

In all the cases where the rights of purchaser have been given effect to, the purchasers or mortgagees had possession. This was the case in *Yesu* v. *Balkrishna*[1] where the status of mortgagees as purchasers under article 134 was first recognized. The same was the case in *Pandu* v. *Vithu*[2], where the word "purchaser" was defined, in the words of their Lordships of the Privy Council in *Radanath Doss* v. *Gisborne and Co.*[3], as one who purchases what is *de facto* a mortgage upon a representation, and in the belief that he is purchasing an absolute title. Possession was also admitted in the case of the auction purchase which was upheld in *Muthu* v. *Kambalinga*[4]. Both on principle and precedent it is thus clear that the purchaser from a mortgagee of what is represented and believed to be absolute right must be a purchaser with possession. His possession is an essential element of this purchase *sub modo*, which alone can make the purchase valid as against the true owner after twelve years' enjoyment.

(1) (1891) 15 Bom., 583.
(2) (1894) 19 Bom., 140.
(3) (1871) 14 M. I. A., 1.
(4) (1889)12 Mad., 316.

This point becomes still more clear when it is borne in mind that the same article 134 refers to alienations by trustees. These, like alienations by mortgagees, are protected after twelve years' possession. In the case of alienations by trustees, unless there is a transfer of possession to the alienee, the transaction would be incomplete and of no effect against the *cestui que trust*. The ruling in *Manikkal* v. *Manchersha Dinsha*[1] refers to such alienations by trustees. So far as that ruling related to the question of *bona fides*, article 134 has rendered all inquiry unnecessary, but the element of possession was then, as now, necessary to validate the purchase as against the true owner. The alienations of temple property, which were the subject of dispute in *Nilmony Singh* v. *Jagabandhu Roy*[2] and *Sajedur Raja Chowdhuri* v. *Gour Mohun Das*[3], also involved transfer of absolute right and possession. It is also clear that under English law (3 and 4 Vic., C. 27, Sec. 25, which corresponds to article 134), possession by the purchaser for valuable consideration for the statutory period of property conveyed in breach of trust is necessary to validate the trust as against the *cestui que trust*[4]. In English law, mortgages are effected in the form of purchases; and the law of trusts governs to a large extent the equitable relations between mortgagor and mortgagee. The Indian law has followed the English law in this respect, and this analogy of trusts makes it clear that when the purchaser from the mortgagee is under the belief that he is purchasing an absolute title, there must be an enjoyment of possession for the statutory period to validate his purchase as against the original mortgagor. The Courts below have, therefore, correctly applied the law, and we confirm the decree of the lower appellate Court. Costs in each appeal on the respective appellants.

Decree confirmed.

(1) (1876) 1 Bom., 269.
(2) (1896) 23 Cal., 536.
(3) (1897) 24 Cal., 418.
(4) Lewin on Trusts, p. 633, 5th Ed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *February* 14

VIRUPAKSHAPPA (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* SHIDAPPA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Minor—Suit on behalf of minor—Decree—Compromise of decree by next friend—Application to set aside compromise—Modes of impeaching the decree—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), Sec. 462.

Where a decree to which a minor is a party has been compromised with leave of the Court granted under section 462 of the Civil Procedure Code (Act XIV of 1882), the compromise cannot be subsequently re-opened by the Court *proprio motu* on the ground that it gave the minor less property than he was entitled to under the decree. The modes in which such an order can be impeached are, at the most, two, namely, by review or by suit.

APPEAL from the decision of Ráo Bahádur Mahadeo Shridhar, First Class Subordinate Judge of Sholápur.

The plaintiffs, by their mother and next friend, sued for partition in 1895, and on 21st December, 1897, obtained a decree for their shares. In execution certain property in possession of the defendants was attached. On the 13th June, 1898, the plaintiff Shidappa, who described himself as then of age, and his brother Basappa (the co-plaintiff) by his guardians (his mother and brother) applied to the Court to release the attached property and restore it to the defendants, stating that they (the plaintiffs) had adjusted the decree on the 6th June, 1898, and taken possession of the property given to them under the adjustment, and had no further claim against the defendants. The Court granted the application and ordered the *darkhást* to be struck off the file after restoring the attached property to the defendants.

On the next day (14th June, 1898) one Nijlingappa, a stranger to the suit, alleging himself to be interested in the plaintiffs, applied that the *darkhást* should be restored to the file and that further inquiry into the matter should be made. He stated that it was not true that Shidappa had attained his majority, and alleged that the guardian had been deceived, and that the adjustment had been made in fraud of the minors.

The defendant Virupakshappa opposed the application, contending that Nijlingappa had no authority to move in the matter; that the

*Appeal No. 88 of 1898.

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VIRUPAK-SHAPPA v. SHIDAPPA.

statements made in his application were untrue; that the adjustment of the decree had been honestly made and communicated to the Court which recognized it; that the adjustment was beneficial to the plaintiffs; and that the Court had no power to go into the matter after the *darkhást* had been struck off the file and the whole execution proceeding concluded.

The Judge held that the adjustment of the decree ought not to be recognized and that the execution should proceed. The following is an extract from his judgment:—

"I think I can entertain Nijlingyppa's application. The application by plaintiff No. 1 and Nilgangwa was granted and the *darkhást* was ordered to be struck off, but the fact that the decree was compromised on behalf of minor plaintiffs by their next friend and mother does not appear to have been brought to the notice of the Court. The application appears to have been considered as made under section 257 of the Civil Procedure Code. It is, therefore, open to me to inquire whether the decree was adjusted and the plaintiff's mother received the money and property under the adjustment with or without the leave of the Court, or whether the minor's interests have not been prejudicially affected. I am also of opinion that I can make this inquiry *proprio motu*, or on the application of any person interested in the welfare of the minors.

"There is no evidence in this case to show that the plaintiff No. 1, Shidappa, has attained majority. Under the Civil Procedure Code it is his right to elect to prosecute the suit as a major, and till he has exercised this right he is to be treated as a minor. Plaintiff No. 1 is not only not proved to have arrived at man's estate, but has made no application electing to be treated as a major. I am also of opinion that the adjustment of the decree cannot take effect as regards plaintiff No. 1.

"There remains the first issue (namely, whether the adjustment of the decree is beneficial to the minor plaintiffs) and that is easily disposed of. The *darkhást* gives the plaintiff's property of less value than that they were entitled to under the decree. A comparison of the decree with the parkhat makes this clear."

Defendant No. 1, Virupakshappa, appealed.

Dattatraya A. Idgunji for the appellant (defendant No. 1):—The Judge was wrong in treating the application of the 13th June, 1898, as one under section 257 of the Civil Procedure Code. The fact that one of the applicants was a minor was apparent on the face of the application. The adjustment was not only certified to the Court; the leave of the Court was asked for and granted. This was sufficient compliance with section 462 of the Civil Procedure Code—*Usman* v. *Gyanu*[1]. Shidappa described himself as having attained

(1) P. J., 1891, p. 111.

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full age; the proceedings taken by him on his own behalf were not invalid—*Doorga Mohun Dass* v. *Tahir Ally*(1). The adjustment was conclusive as against him. There was no evidence to show that he had not attained majority. The entertaining of the application of the 14th June, 1898, and the subsequent inquiry were *ultra vires*. There is no provision of law enabling a Court *proprio motu*, or on the application of a person describing himself as interested in the welfare of the minors, to open up an adjustment duly sanctioned by the Court—*Karmali* v. *Rahimbhoy*(2); *Mirali* v. *Rehmoobhoy*(3); *Eshan Chundra* v. *Nundumoni Dassee*(4); *Bibee Solomon* v. *Abdool Azeez*(5). The only mode of doing so is by review under section 623 or by suit under section 11 of the Civil Procedure Code.

The mere fact that the adjustment allotted property of less value than that granted by the decree, does not show fraud. The family property consisted of large outstandings and included bad debts. The plaintiffs were paid in cash, and an allowance was made in our favour, because we undertook the risk of recovering the outstandings and bad debts. This was, we submit, a fair arrangement.

There was no appearance for the respondents (plaintiffs).

PARSONS, J.:—The Subordinate Judge, no doubt, acted hastily in granting the application of the 13th June and striking off the *darkhást* without enquiry. He says that the fact that the decree was compromised on behalf of the minor plaintiffs by their next friend and mother, does not appear to have been brought to the notice of the Court, but that fact was apparent on the face of the application itself, and the Subordinate Judge should not have sanctioned the compromise without being satisfied that it was *bonâ fide* and for the benefit of the minors. Nevertheless the fact remains that the leave of the Court was given to it and it must be considered to have been granted under section 462 of the Civil Procedure Code. It was not, therefore, we think, a matter that the Subordinate Judge could re-open *proprio motu* as he has done and set aside his order on the mere ground that the compromise gave the minors less property than what they were entitled to under the decree. The modes in which such an order can be impeached have been fully discussed in the case

(1) (1894) 22 Cal., 270.
(2) (1888) 13 Bom., 137.
(3) (1891) 15 Bom., 594.
(4) (1884) 10 Cal., 357.
(5) (1881) 6 Cal., 687.

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of *Karmali Rahimbhoy* v. *Rahimbhoy*(1) and in the cases therein cited, and resolve themselves into two at the most, *viz.*, by review or by suit. In the present case no suit has been filed, and the minors have not approached the Court at all to ask for relief, so that we cannot treat the proceedings of the lower Court as taken upon an application for review of the order.

We must reverse the order of the 15th October, 1898, as made without jurisdiction, leaving the minors, or some one legally competent to act on their behalf, free to take such steps as they may be advised to take, if they wish to have the order of the 13th June set aside.

Order reversed.

(1) (1883) 13 Bom., 137.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899.

February 28.

RATANLAL (ORIGINAL DEFENDANT No. 3), APPELLANT, *v.* BAI GULAB, (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), *Sec.* 231—*Application for execution by one of several joint decree-holders—Order refusing to allow execution by one of several joint decree-holders—Appeal—Practice.*

No appeal lies against an order under section 231 of the Code of Civil Procedure (Act XIV of 1882), refusing to allow one of several joint decree-holders to execute a joint decree.

APPEAL from the decision of Ráo Bahádur K. B. Marathe, First Class Subordinate Judge of Surat.

One Ratanlal Rangildas and Utamram Itcharam traded together in partnership in Bombay.

Utamram was charged with criminal breach of trust in respect of certain jewellery entrusted to him for sale by one Bai Gulab of Surat.

In execution of a search warrant issued by the First Class Magistrate of Surat, the Police seized the jewellery from the accused's partner, Ratanlal, and produced it before the Magistrate.

* Appeal, No. 101 of 1898

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RATANLAL v. BAI GULAB.

The Magistrate, after trying the case, discharged Utamram and passed an order directing the jewellery to be handed over to the complainant, Bai Gulab.

The High Court set aside this order and directed the jewellery to be restored to the possession of Ratanlal from whom it was taken[1].

Thereupon Bai Gulab filed a suit, No. 247 of 1892, to establish her title to the jewellery in question, and for an injunction restraining Utamram (defendant No. 2) and his partner Ratanlal (defendant No. 3) from taking away the property from the Magistrate's Court. Pending this suit the Názir was appointed receiver of the property in dispute.

The Subordinate Judge decided the suit in Gulab's favour, awarding her possession of the property.

In execution of this decree the Názir handed over the property to Bai Gulab.

In appeal the High Court reversed the decree of the Subordinate Judge and dismissed Gulab's suit with costs as against Utamram and Ratanlal (defendants Nos. 2 and 3).

Thereupon Ratanlal (defendant No. 3) alone applied for execution of the High Court's decree for costs and for restitution of the jewellery handed over by the Názir to Gulab (the plaintiff). This application was resisted by Utamram.

The Subordinate Judge rejected this application, holding that Ratanlal alone was not entitled to execute the decree of the High Court, which was in favour of both him and Utamram jointly. He referred them to a separate suit to determine their respective rights.

Against this decision defendant No. 3 appealed to the High Court.

Ramdatt V. Desai and *G. S. Rao* for appellant.

M. N. Mehta and *K. M. Javheri* for respondent.

PARSONS, J.:—The decree of the High Court, sought to be executed in this case, was certainly a joint decree in favour of the

(1) (1892) 17 Bom., 748.

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KATANLAL v. BAI GULAB.

defendants Nos. 2 and 3, since it reversed the decree passed by the Subordinate Judge, First Class, and ordered the suit against them to be dismissed with costs, thus entitling them to recover their costs jointly and also to obtain the restitution of any thing taken from them under the reversed decree. It is admitted that they were partners at the time of the decree, and presumably, therefore, the ornaments taken from them (or rather from the Názir who held them on their behalf) were their joint property. This being so, the order of the Court refusing to allow the decree to be executed by the defendant No. 3 alone must have been passed under section 231 of the Code of Civil Procedure, and no appeal lies against that order. See *Bai Kashi* v. *Chunilal Vishvanath*[1].

In the present case, the defendant No. 2 has himself come forward and directly impugned the right of the defendant No. 3 to alone execute the decree, and the Subordinate Judge has referred them to a civil suit to determine their respective rights. This he had a discretion to do, and we see no reason to interfere. The case of *Lakshmi Ammah* v. *Pounassa* [2] cannot be said to be in point; for, here the contest is essentially one between the two joint decree-holders. It has been argued before us that at any rate the lower Court should have ordered the decree to be executed so far as to take the ornaments out of the possession of the plaintiff and recover the amount of the costs, and should then hold the same for the benefit of whoever may ultimately be found to be entitled thereto. No doubt this is a sound argument, but up to the present that Court has not been asked to do this. It will be time enough to come here when that Court has been asked and has refused to do so. We dismiss the appeal with costs.

Appeal dismissed.

(1) P. J., 1890, p. 249. (2) (1893) 17 Mad., 394.

TESTAMENTARY AND INTESTATE JURISDICTION.

Before Mr. Justice Starling.

1899. *March* 18.

MOWJI DHARAMSEY, PLAINTIFF, *v.* NEMCHAND NARANJI AND OTHERS, DEFENDANTS.*

Practice—Commission—Application by a defendant (caveator) to examine witnesses on commission—Civil Procedure Code (Act XIV of 1882), Chap. XV.

Where a defendant (caveator) applied for the issue of a commission to examine witnesses, the Judge having regard to the circumstances of the case and to the principles laid down in *Berdan* v *Greenwood* (1) refused the application.

THE plaintiff applied on the 5th December, 1898, for letters of administration to the estate of one Vassonji Harrakchand, who was alleged to have died intestate at Porbandar in Káthiáwár on the 15th December, 1891. In his petition he alleged that he was one of the three nephews and heirs of the deceased, and that there was no other nearer relative living.

On the 21st December, 1898, the defendants Nemchand Naranji and Bhimji Ramdas filed a caveat, alleging that the deceased had left a will, and that they were the executors appointed thereby.

On the 10th January, 1899, another caveat was filed by the defendant Kalidas Vandravandas, also stating that the deceased Vassonji had left the will alleged by the other caveator Nemchand Naranji. He further alleged that by the said will Vassonji had left his property to his wife Mankuverbai, who had accordingly taken possession of it and enjoyed it until her death in January, 1898; that she left a will whereby she appointed him (Kalidas) and one Devchand Ramchand his executors. He claimed that all the property of Vassonji which had come to Mankuverbai had now vested in him and his co-executor.

The original will was not forthcoming. Each caveator alleged that it was in the possession of the other, and that he himself had only a copy of it.

The defendant (caveator) Nemchand now applied for a commission to Porbandar to examine the persons who, he alleged,

* Testamentary Suit, No. 1 of 1899.

(1) (1880) 20 Ch. D., 764, foot-note (3).

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MOWJI v. NEMCHAND.

were witnesses to the will and who would prove its execution. He obtained a Judge's summons on 28th February, 1899, calling on the plaintiff to show cause why a commission should not issue.

Macpherson for the plaintiff showed cause.

Lowndes in support of the summons.

Viccaji for the third defendant.

STARLING, J.:—In this suit the plaintiff, Mowji Dharamsey, as one of the nephews and reversionary heirs of the deceased Vassonji Harrakchand, seeks for letters of administration to his uncle's estate on the death of the widow, his aunt.

The first two defendants have filed a caveat on the ground that the deceased did not die intestate, but left a will. The third defendant Kalidas Vandravandas files a caveat on the same ground. The will, however, is not forthcoming, each set of defendants alleging that it is or should be in the possession of the other, and both sets alleging that they possess a copy of the will, the two copies, however, differing from each other in one important point at least.

Under these circumstances the first set of defendants apply for a commission to Porbandar to examine their witnesses not *viva voce*, but on interrogatories in order to prove the existence and contents of the will, on the ground that they cannot procure their attendance in Bombay, an application which is opposed by the plaintiff.

The case of the defendants as to the existence of a will is, on the face of it, suspicious, and to make it more so, after I had offered on Saturday to examine to-day two witnesses (one of them being the same Kalidas Vandravandas mentioned above), who were stated to be in Bombay, it was announced that they had gone away by the morning train. Saturday was known by Kalidas Vandravandas to be the day for the hearing of the summons, for he had instructed Mr. Viccaji on his behalf, although the summons had not been served on him, and it was not unlikely that an order for the examination *de bene esse* of witnesses then in Bombay would have at once been made.

I adjourned the hearing till to-day to enable me to look into the English cases, and I have done so, and it seems to me

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that the case of *Berdan* v. *Greenwood*(1) lays down a number of principles which are directly applicable to the present application. That was a case in which the plaintiff applied for his examination on commission on the ground that he was suffering from fatty degeneration of the heart and that a passage across the channel would very probably cause his death. I will refer to the principles laid down by the Court of Appeal in that case (pp. 765, 766 and 768). Baggallay, L. J., said:—

"We must regard the interests of justice, the interest of the defendants as well as that of the plaintiff, and of course we must consider the nature of the issues which are raised in the pleadings.

"One can well imagine the extreme importance to the defendants, in a case of this kind, of having the fullest opportunity of thoroughly investigating the claim and testing by cross-examination the witnesses who are called.

"I am very unwilling to express any opinion upon the question which has been so much argued, the credibility of General Berdan, but in considering whether the examination of a witness should be taken by commission, we must have regard, at any rate, to the possibility of his not being a credible witness. If the witness is a credible witness, it is hardly material whether he gives his evidence *viva voce* in Court or before a commission, or by affidavit, or in any other form. But we must assume the possibility of his not being a credible witness, and then it becomes of the most extreme importance that the jury or the Court which has to decide the question should have the opportunity of seeing the demeanour of the witness, and observing the way in which the various questions which are put to him in cross-examination are answered."

Cotton, L. J., said:—

'But we ought to consider not merely what the plaintiff's case requires, but what justice to the defendant as well as to the plaintiff requires. And in such a case as this it is, in my opinion, eminently important that the demeanour of the witness should be seen and his precise answers to the questions put to him should be heard by the Judge, or the Judge and jury, who have to decide the case, and that the defendants should have the fullest opportunity of cross-examining him, they being really only able to do that effectually when the witness is in Court, and his demeanour, and the way in which he answers the questions can be judged of by the Judge and by the jury."

Now taking into account the case of the plaintiff and also that of the defendants, taking into account the fact that the will itself is not forthcoming, and that the copies which are alleged to exist do not agree with each other, and taking into account the fact

(1) (1880) 20 Ch. D., 764, foot note (3).

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that these witnesses will not give their evidence nor be cross-examined *viva voce* (the last a point much relied upon in *In re Boyse, Crofton* v. *Crofton*)(1); taking also into account the fact that two of the witnesses now sought to be examined on commission have recently been in Bombay and only went away on last Saturday morning, so that it is evident that, if the applicant had been so minded, he might have had them examined here *de bene esse* last week: also taking into account that it is not clear on the affidavits that it will be impossible to get the witnesses to come to Bombay for the trial, or that the applicant may not be able to examine some of them *de bene esse* in the meantime, if they should visit Bombay, (for it is evident that some do come here from time to time), and applying to these facts the principles laid down in the cases I have already cited, I have come to the conclusion that it is not in the interests of justice that these witnesses should be examined in the way it is proposed, and that, using a judicial discretion, it is my duty to refuse to grant the commission asked for.

The summons will, therefore, be dismissed with costs. Counsel certified for.

Summons discharged.

Attorneys for plaintiff:—Messrs. *Mansukhlal, Damodar and Co.*

Attorneys for defendants:—Messrs. *Bicknell, Merwanji and Motilal.*

(1) (1882) 20 Ch. D., 760.

ORIGINAL CIVIL.

Before Mr. Justice Starling, and, in appeal, before Sir L. Jenkins, Chief Justice, and Mr. Justice Candy.

LUXUMIBAI (PLAINTIFF), *v.* HAJEE WIDINA CASSUM (DEFENDANT).*

1899, *March* 28; *August* 18.

Practice—Arbitration—Order of reference to arbitration—Civil Procedure Code (Act XIV of 1882), *Sec.* 506*—Jurisdiction—Absence of written authority to refer.*

By a Judge's order consented to by the plaintiff and defendant this suit was referred to arbitration on the 13th December, 1898. In the following January

* Suit No. 196 of 1897; Appeal No. 1025.

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and February two meetings were held before the arbitrator which were attended by the defendant and the managing clerk of his then attorney, and he took an active part in the proceedings. Subsequently the defendant changed his attorney and declined to proceed with the arbitration, contending that the order of reference was illegal, inasmuch as no special authority in writing was given by the parties to their attorneys to obtain the order, as required by section 506 of the Civil Procedure Code (Act XIV of 1882). He took out a summons to set aside the order.

Held (dismissing the summons) that the absence of a written authority did not invalidate the order of reference.

IN chambers. Summons taken out by the defendant, dated 17th March, 1899, calling on the plaintiff to show cause why an order dated 13th December, 1898, referring this suit to arbitration should not be set aside.

This suit was brought by the plaintiff to recover damages for breach of an agreement. In December, 1898, the parties agreed to refer the suit to arbitration, and by a consent order dated 13th December, 1898, the suit was referred by Russell, J., to two arbitrators therein named. In January and February, 1899, two meetings were held before the arbitrators which were attended by the defendant and the managing clerk of his then attorney, and the defendant took an active part in the proceedings.

Subsequently, however, the defendant changed his attorney and declined to proceed with the arbitration, contending that the order of reference was illegal, inasmuch as no special authority in writing had been given by the parties to their attorneys to obtain the order of reference as required by section 506 of the Civil Procedure Code (Act XIV of 1882).

On the 17th March, 1899, the defendant took out the above summons.

Lowndes for plaintiff showed cause:—Even if the defendant was at one time entitled to have the reference set aside, he is not so now—*Unniraman* v. *Chathan*[1]. He attended two meetings—*Halimbhai* v. *Shanker Sai*[2]; *Ardesar H. Wadia* v. *Secretary of State for India*[3]; *Wynne* v. *Edwards*[4]; *Sultan Muhammad* v. *Sheo Prasad*[5]. He also cited *Jogessur* v. *Kulyance*[6].

(1) (1886) 9 Mad., 451.
(2) (1885) 10 Bom., 381.
(3) (1872) 9 Bom. H. C. Rep., 177.
(4) (1844) 12 M. and W., 708 at p. 712.
(5) (1897) 20 All., 145.
(6) (1875) 24 Cal. W. R., 41.

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Scott for defendant, *contra*. He cited the following cases:—*Pestonjee Nusserwanjee* v. *Manockjee* [1]; *Nusserwanjee Pestonjee* v. *Meer Mynodeen Khan*[2]; *Jeyasankira Devi* v. *Nagannada Devi*[3], *Kishna Ram* v. *Subodra Bebee*[4].

STARLING, J.:—In this case the plaintiff and defendant through their attorneys agreed to refer the suit to arbitration, and a Judge's order was by consent of both attorneys signed in order to carry out that agreement. It is quite clear from the letters annexed to the affidavits of Pandurung Shamrao Laud that there was a considerable amount of correspondence between the attorneys to the parties about the terms of the reference of which the defendant was cognizant, and that he agreed to the order of reference as finally settled. This he does not deny; but he alleges that, as he did not sign a special authority to his attorney to sign the consent order that order is not binding upon him, and ought to be set aside. Between the date of the order of reference and the defendant's application to have it set aside, two meetings of the arbitrators were held at which the defendant was apparently present; at the first of which, copies of the plaint and the written statement were given to the arbitrators and the case was explained to them, and at the other a witness was called and produced the agreement between the plaintiff and defendant upon which the suit was based, but at neither of these meetings did the defendant make any objection to the arbitration proceeding. After that, he changed his attorney two and half months after the date of the order of reference, sent notices to the plaintiff and to the arbitrators withdrawing his assent to the arbitration, and finally took out the present summons.

Mr. Scott relied upon the words of section 506, Civil Procedure Code, which provide that where a party is not present in person, his pleader must be specially authorized in writing to consent to a reference, and argued upon the authority of *Nusserwanjee* v. *Meer Mynoodeen Khan*[5] that this was a special jurisdiction given in special terms by an Act of the Legislature, and that in order to give the jurisdiction, every one of those terms

(1) (1868) 12 Moo. I. A., 112.
(1855) 6 Moo. I A., 134 at p. 155.
(2) (1862) 1 Mad. H. C. Rep., 106.
(3) N. W. P. S. D. R., 1863, 127.
(4) (1855) 6 Moo. Ind. Ap., at p. 155.

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must be complied with. No doubt that is a decision to which I must bow if it is applicable to this case; but I may remark that the facts of that case and the regulation which was being interpreted are not quite on all fours with the present facts and Act. I can find no reported case in which such a contention as the present one has been raised during the pendency of an arbitration. Mr. Lowndes has, however, referred to several, in which the objection has been made to an award on the ground that the pleader of the unsuccessful party was not authorized in writing to consent to the reference—*Unniraman* v. *Chathan*[1]; *Halimbhai* v. *Shanker Sai*[2]; *Ardesar* v. *Secretary of State for India*[3]. Besides these I have found the case of *Satwjit Pertap* v. *Dulhin Gulab*[4], in which the case of *Unniraman* v. *Chathan*[5] was approved and followed. In all these cases, the Courts refused to set aside the award on the ground that the reference was not authorized personally in Court by the party complaining or by a pleader specially authorized in writing. Mr. Lowndes also referred to the case of *Jogessur* v. *Kulyanee*[6] in which it was held that the corresponding section of the Code of 1859 was an enabling section and that the acts of the parties *sui juris* ought to be interpreted liberally.

I feel that this is a point of some difficulty, but at the same time I am not disposed to assist a party who has agreed to an order of reference, and has gone on with the arbitration under it to a certain extent, in turning round and saying he is not bound by it for no other reason than that he has not signed it, for there is no doubt that, if he had signed it, he could not now have backed out of it. The principles laid down in the cases cited by Mr. Lowndes seem to me to be applicable to the present case, and I shall, therefore, follow them. Besides this, although the point was not argued before me, I am inclined to think that when a party has seen an order, and authorized his attorney to consent to it, even though he does not sign it, that writing may be regarded as a special authorization in writing to his attorney to consent to the terms referred to therein.

(1) (1886) 9 Mad, 451.
(2) (1885) 10 Bom, 381.
(3) (1872) 9 Bom. H. C. Rep., 177.
(4) (1897) 24 Cal, 469 at p. 472.
(5) (1886) 9 Mad., 451.
(6) (1875) 24 Cal. W. R., 41.

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I must, therefore, dismiss the summons with costs. Counsel certified for.

The defendant appealed. It was urged that there had been no valid reference to arbitration: that by reason of the non-observance of the formalities prescribed by section 506 of the Civil Procedure Code (Act XIV of 1882) the Judge in chamber (Russell, J.) had no jurisdiction to refer the matter in question in the suit to arbitration under Chapter XXXVII of the Civil Procedure Code (Act XIV of 1882), and that the absence of the prescribed formalities could not be cured by any conduct of the defendant not amounting to a compliance with such formalities.

The appeal was heard by Jenkins, C. J., and Candy, J., on 18th day of August, 1899.

Scott (Acting Advocate General) for the appellant (defendant).

Macpherson for the respondent (plaintiff).

In addition to the authorities cited in chambers the following were cited:—Maxwell on Statutes, p. 518; *Andrews* v *Elliott* [1]; *Barker* v. *Palmer* [2].

JENKINS, C. J.:—This is an appeal from an order of Mr. Justice Starling refusing an application to have the suit set down on the board of causes for trial.

The point on the appeal is whether a reference to arbitration directed by an order passed by Mr. Justice Russell on the 13th December, 1898, is void by reason of non-compliance with the terms of section 506 of the Code of Civil Procedure.

It is clear that the Court has no power of its own motion to order a reference, and it can only do so under the provisions of Chapter XXXVII of the Code of Civil Procedure. The power to make the order is given by section 508, and section 506 contains the provisions as to how the order is to be applied for. From that section it appears (1) that all the parties to the suit must desire a reference, (2) they must all apply to the Court for an order of reference, (3) they must apply either in person or by their respective pleaders specially authorised in writing, (4) the

[1] (1855) 25 L. J. (Q. B.) 1; 5 Ell. and Bl., 502. [2] (1881) 8 Q. B. D., 9.

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application must be in writing, and state the particular matter sought to be referred.

Now in this case the defect exists only in respect of one of these four heads. It is beyond all doubt that all the parties in this case desired a reference. I think, too, it may be said that there was a sufficient application in writing to satisfy the requirements of the section, and it is also clear that all the parties made the application by their attorneys and that those attorneys were specially authorised in that behalf. It has not been suggested before us that respondent's attorney was not duly authorised so, I therefore assume, no question arises on that head, and it is shown that the appellant knew before the order was made of its proposed terms accurately and precisely; gave instructions for the application, and, after the order was passed, he became aware of it and acted on it by attending the two meetings convened by the arbitrator. The only defect is that the authorisation (the existence of which is beyond all question) was not expressed in writing. What, then, under the circumstances of the case is the consequence of that defect? Now I feel no doubt that the Court could, on the score of it, have declined to make the order, and, if it had been brought to its notice, would probably have done so. As a matter of fact, attention was not called to the defect, and the order was made. But is the appellant entitled to come to the Court now and ask for an order which can only be made if Mr. Justice Russell's order—from which no appeal was preferred—be treated as a nullity, simply by reason of this defect? For, the Advocate General has very candidly admitted that he relies on this defect alone, and that it is of a purely technical character. Ought the section to be so construed as to attribute to the provision for written authorisation so mandatory a character as that failure to observe it must result, under all circumstances, in a complete nullification of the order and all consequent proceedings? While recognising to the full the desirability of a written authority, a desirability which is the more obvious in the mofussil than in the High Courts, I am unable to come to that conclusion. I think the provision is one which properly comes within the rule that consent cures errors, and that under appropriate circumstances the defect is not fatal.

In support of his view the Advocate General has relied on *Nusserwanjee Pestonjee* v. *Meer Mynoodee Khan*[1] and more particularly on the principle enunciated at page 135. It has been said that case is distinguishable in that it did not deal with the section now in hand, but I would not seek to distinguish it on that ground, because the principle it lays down is of universal application. It appears to me, however, that the facts of this case do not invite the application of the principle. There no order had been made, but it simply was that the parties had proceeded with their reference under a document which was deficient in a material particular, and when the Court was asked to act on it, the application was refused as it was not made on proper materials. That case was in fact at the stage this one was when Mr. Justice Russell made his order. Here, however, the matter has advanced a stage further the order has actually been made and the case has reached that point at which it may be asked whether the rule that consent cures error should not be applied. I am fortified in this conclusion by a later decision of the Judicial Committee also reported in the same volume—*S. B. Haines* v. *The East India Company*[2], or perhaps it would be more correct to say by the cases of *Tyerman* v. *Smith*[3] and *Andrews* v. *Elliott*[4] and in error at page 3, where the rule to which I have referred was applied in a state of facts bearing an essential resemblance to the present. It is to be noted in this connection that in both the cases in Moore the opinion of the Board was expressed by Sir John Patteson.

Having then come to the conclusion that the defect is not fatal it only remains to consider whether in this case the facts justify us in treating it as cured. This is a point on which each case must be governed by its own circumstances, and here I think there can be no doubt that we ought not to allow the technical objection to prevail. The appeal will, therefore, be dismissed and the order of Mr. Justice Starling affirmed with costs.

Before parting with the case I should say that Mr. Macpherson at one time suggested that there might be a preliminary objection that no appeal would lie, but, as he did not press this objec-

(1) (1855) 6 Moo. I. A., 134.
(2) (1855) 6 Moo. I. A., 467.
(3) (1855) 25 L. J. (Q. B.), 359.
(4) (1855) 25 L. J. (Q. B.), 1.

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tion or present any argument in support of it, I have not thought it necessary to deal with it in disposing of the appeal.

CANDY, J.:—I concur. I think the absence of a writing in this case does not make the order invalid. The vital point according to the section is the desire of the parties that the order should be made, and there is no doubt that in this case that desire existed.

Appeal dismissed with costs.

Attorneys for plaintiff:—Messrs. *Smetham, Bland and Noble.*

Attorneys for defendants:—Messrs. *Thakurdas, Dharamsi, Cama and Hormasji.*

APPELLATE CIVIL.

Before Mr Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899. *February* 20.

GANPAT VENKATESH DESPANDE (ORIGINAL PLAINTIFF), APPELLANT, *v.* GOPALRAO VENKATESH DESPANDE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS *

Partition—Son born after partition—Right of such son to partition—Share of such son—Family arrangement—Limitation—Hindu law.

In the year 1875, one Venkatrav having at that time three sons, *viz*, defendants Nos. 1, 2 and 3, divided his property, allotting one third to the first defendant and retaining the remaining two-thirds in his own possession in the interest of his other two sons (defendants Nos 2 and 3), who were then minors. The latter continued to live with him, and he managed the property. The first defendant was the son of Venkatrav's elder wife and the second and third defendants were the sons of his younger wife. In 1880 the plaintiff was born and in 1894 he brought this suit by his mother (the younger wife) as next friend for a partition of the whole of Venkatrav's property, including that which in 1875 had been allotted to the first defendant. The plaintiff claimed a fourth share.

Held, that the plaintiff was not entitled to any part of the property which had been given to the first defendant in 1875. The family arrangement then made had been acquiesced in for more than twelve years and could not be disturbed. The plaintiff could only claim against defendants Nos. 2 and 3, who lived with their father in union and with whom the plaintiff himself had lived as member of a joint family.

APPEAL from the decision of Ráo Bahádur G. V. Bhanap, First Class Subordinate Judge of Dhárwár.

Suit to set aside a prior partition and for a fresh partition.

* Appeal, No. 64 of 1898.

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The plaintiff was the youngest son of Venkatrav Despande and was born in 1880. Venkatrav Despande had two wives, the elder of whom was the mother of one son (defendant No. 1) and the younger of whom was the mother of the plaintiff and two other sons (defendants Nos 2 and 3).

In 1875 (*i. e*, four years prior to the birth of the plaintiff) Venkatrav, having then only three sons (defendants Nos. 1, 2, 3) and having disagreed with defendant No. 1 (the eldest of them), made a division of his property and gave a one-third share to the defendant No. 1, and retained the remaining two-thirds in his own possession in the interest of his other two sons (defendants Nos. 2 and 3). These two sons were then minors. Venkatrav continued to live with them and to manage the property until his death.

In 1894 the plaintiff, who was then still a minor, brought this suit claiming a fourth share of the whole of his father's property, including that which had been allotted to defendant No 1 in 1875 as well as that retained by Venkatrav for defendants Nos. 2 and 3. He prayed that the partition effected in 1875 might be declared cancelled, and he claimed mesne profits. He contended that he was not bound by the partition in 1875, as Venkatrav's wife was then capable of bearing children, and Venkatrav was, therefore, not competent to make a partition.

The first defendant contended that the share allotted to him in 1875 was exempt from a fresh partition; that he had been ever since that time in undisturbed possession as owner, that the plaintiff's claim should be limited to that portion of the property which was in the hands of his (plaintiff's) full brothers (defendants Nos. 2 and 3).

Defendants Nos. 2 and 3 admitted the claim and prayed that their respective claims should be awarded to them separately.

Defendants Nos. 4 to 23, some of whom did not appear, resisted the claim on the ground that they were alienees, either by purchases or mortgages, of parts of the properties from defendants Nos. 1, 2 and 3.

The Subordinate Judge disallowed the claim as against defendant No. 1. He passed a decree directing the plaintiff to recover

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one-third share from the property in the possession of defendants Nos. 2 and 3, after paying one-third share of the debts due by them.

The plaintiff appealed. Pending the appeal he attained majority and the name of his next friend was struck off the record.

Branson (with *Daji A. Khare*) for the appellant (plaintiff):—The Judge erred in rejecting our claim for the cancellation of the partition of 1875. At the time of that partition our mother had not passed the stage of child-bearing, and consequently the partition then made cannot stand to our detriment. The authorities are quite clear and they show that we are entitled to a fourth share in the whole property including that allotted to defendant No. 1, as well as that retained for defendants Nos. 2 and 3. The Judge held that our claim to a share in the property allotted to defendant No. 1 cannot lie. This is not a correct view. We are entitled to have the partition re-opened—Mayne's Hindu Law, para. 431; Colebrook's Hindu Law, Vol. II, p. 268; *Krishna* v. *Sami*[1]; *Chengama* v. *Munisami*[2]. The partition deed of 1875 shows that the immoveable property only was divided and not the moveable. We, therefore, contend that the alleged partition was merely a family arrangement made for the purpose of settling quarrels between the father and one son. The arrangement was not by itself a partition.

Inverarity (with *Manekshah J. Taleyarkan*) for respondent No. 1 (defendant No. 1):—The view taken by the Judge as to the plaintiff's position according to Hindu law is correct. The partition effected by Venkatrav in 1875 is binding on him. The plaintiff is entitled to recover only a share in the property which was in his father's hands at the time of his birth—*Yekayamian* v. *Agniswarian*[3]; *Nawal Singh* v. *Bhagwan Singh*[4]. If the allegation of the plaintiff be correct that his father retained only moveable property, then these rulings show that he can take a share in that property only, and has no right to a share in the immoveable property. If Venkatrav had made a *bonâ-fide* alienation of a portion of the property to a stranger before the plaintiff's birth,

(1) (1 8) 9 Mad., 64.
(2) (1896, 20 Mad., 75.
(3) (1369) 4 Mad. H. C. Rep., 307.
(4) (1832) 4 All., 427.

such an alienation would have bound the plaintiff—*Rambhat* v. *Lakshman* [1]. The cases of *Krishna* v. *Sami* [2] and *Chengama* v. *Munisami* [3] do not apply.

Dhondu P. Kirloskar for respondents Nos. 7, 8, 11, 12 and 16 (defendants Nos. 7, 8, 11, 12 and 16).

RANADE, J.:—The appellant, who is now major, brought this suit as minor by his next friend, his mother Lakshmibai, against his step-brother and two full-brothers (respondents Nos. 1, 2, 3) and others claiming through them, to cancel a partition made in 1875 in his life-time by their father Venkatrav five years before appellant was born, by which partition a third share in ancestral family property had been assigned to respondent No. 1, and the remaining two-third share had been retained by Venkatrav for the use of the respondents Nos. 2, 3 (who were then minors) in his own possession. Appellant also sought a repartition of his one-fourth share in all the ancestral property.

Respondents Nos. 2 and 3 offered no opposition to the claim, but only asked for a separation of their own shares in the whole of the property.

Respondent No. 1 contended that the appellant had no right to sue him for a cancellation of the partition effected in 1875, and that the claim was time-barred. The appellant might sue his full-brothers and obtain a partition of his one-third share from them.

The lower Court held that this contention of respondent No. 1 was well-founded, and, while rejecting appellant's claim for cancelling the partition of 1875 as against respondent No. 1, it allowed the claim of the appellant as against his full-brothers, respondents Nos. 2 and 3, and directed that appellant might recover his one-third share of the property in their possession after paying one-third share of the debts due by them.

In the appeal before us, it was contended that, as an after-born son, appellant had a right to the relief claimed by him, namely, a cancelment of the partition of 1875, and a repartition

(1) (1881) 5 Bom., 630. (2) (1885) 9 Mad., 64.
(3) (1896) 20 Mad., 75.

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of his one-fourth share in the entire property in the possession of the respondent No. 1, as also of the respondents Nos. 2, 3. The appellant's counsel placed his reliance chiefly on two decisions of the Madras High Court. In the first of these decisions—*Krishna* v. *Sami*[1]—the question in dispute related to the right of the sons of a person, disqualified by reason of his being deaf and dumb, to claim a share with their uncles in the property of their grandfather in the life-time of their disqualified father, even though they were born after the death of their grandfather. This right had been negatived in two decisions of the Calcutta High Court—*Pareshmani* v. *Dinanath*[2] and *Kuludas* v *Krishan Chandra*[3]. Turner, C. J., distinguished these Bengal decisions as being governed by the law of the Dayabhaga, and held that, under the Mitákshara law, the sons of a disqualified sharer, though subsequently born, had a right to divest their uncles, and claim a share of the inheritance.

It will be at once seen that this Madras case did not involve any question as to the binding character of any partition already made, such as is the case in the present dispute. In the course of his judgment, Turner, C. J, referred to the analogy which exists between the right of a disqualified person to inherit, when he is cured of his malady, and the right of a son born after partition, and it was stated that "the son who is begotten and born after partition takes the share of his parents and acquisitions made after partition, or *if his father has reserved no share to himself*, he may call on his brothers to make up a share for him." It was contended by Mr. Branson that, in the present case, Venkatrav reserved no share to himself in the partition of 1875, and that, therefore, appellant, as his son begotten and born after partition, had a right to call upon all his three brothers to make up his one-fourth share. In the other Madras case also—*Chengama* v. *Munisami*[4]—the father had reserved no share to himself, and the High Court allowed the after-born son to claim a share from the separated brothers, not only in the property divided, but also in the accumulations made with the help of the divided property.

(1) (1885), 9 Mad., 64.
(2) (1868) 1 Ben. L. R., 117 (A. C.).
(3) (1869) 2 Ben. L. R., F. B., 103.
(4) (1896) 20 Mad., 75.

If the present dispute had been a case of equal partition between brothers, and the father had reserved no share to himself, but had distributed his property between his three sons, there would be some force in the appellant's contention that the appellant, as an after-born son who could not fall back on his father's share or acquisitions, would have a right to claim re-partition as against the brothers. The peculiar feature of this case, however, is that here there was no partition between the three sons of Venkatrav in which Venkatrav left no share to himself. The appellant-plaintiff in his plaint has stated that what really took place in 1875 was that Venkatrav, owing to his disagreement with respondent No. 1, who was his son by one wife, effected a division by giving one-third of his property to respondent No. 1, and retained the remaining two-third share in his own possession in the interest of his two other sons by a younger wife. These two sons were then minors, and he lived with them and continued to manage this property as owner till his death in 1890, and these two sons as well as plaintiff remained in union with him, and after his death, the respondents Nos 2, 3 managed the property, and the appellant lived with his brothers and his and their mother. The so-called partition-deed brings out this fact very prominently. The deed is called a memorandum made with the full concurrence of the two persons, Venkatrav and respondent No. 1, who have signed it. It recites that, owing to differences, one-third share was separated, and given to respondent No. 1. The details of the lands so set apart are then mentioned, and the deed states that respondent No. 1 and Venkatrav were to recover the profits of the one-third and two-third shares, and pay the judi in proportion. The lands which had come to Venkatrav in right of his eldership were impartible, and, therefore, they were retained by him in his possession for life, but these eldership lands were to revert to respondent No. 1 after Venkatrav's death. The respondent No. 1 was next required to accept responsibility for one-third of the debts due by Venkatrav, and Venkatrav was to be responsible for his two-third share of the debts. The vatan lands were to be entered in respondent No. 1's name after Venkatrav's death, and the three brothers were to enjoy the vatans and

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perform service in their turns. The moveable property was to remain in the possession of Venkatrav and respondent No. 1 as it was in their respective possession on the date of the division. Towards the end there is a re-affirmation of the object of the division, namely, that respondent No. 1's one-third share being separately allotted to him, no disputes remained. Venkatrav put himself forward as making the division of his own accord. The separate shares of respondents Nos. 2 and 3 are nowhere specified, and Venkatrav and respondent No. 1 secured the peace of the family by entering into an amicable arrangement by which respondent No. 1 got a one-third instead of a one-fourth share, but most of the eldership property remained with Venkatrav for his life. It was not, therefore, a case of equal division between brothers or sons in which the father reserved no share to himself. Seeing that he was more than sixty years old at the time, and both his sons by the younger wife were minors, whose interests he would have to protect for the few remaining years that he expected to live, there was nothing surprising in Venkatrav's allotting one-third share to his eldest son. He could not well expect that another son would be born to him when he was nearly seventy years old. The arrangement made in 1875 was thus in every way fair and equitable, and it was acquiesced in as such by all the parties for over twelve years.

The father in a Hindu family has a right when he so desires to make a partition, and it binds his grown-up as well as minor sons. In *Kandasami* v. *Doraisami* [1], such a partition made by a father between two sets of his sons by different wives was upheld when it was shown to be *bonâ fide* and in conformity with Hindu law. Such a family arrangement once made is final, and cannot be re-opened on the ground of the inequality of shares—*Moro* v. *Ganesh* [2]. In *Yekeyamian* v. *Agniswarian* [3], a father had adopted a son, and then a son was born to him. To prevent disputes between the adopted and natural born son, he allotted a certain portion of his property to the adopted son. More sons were born to him by another wife subsequently, and these sons sued the father and the adopted son and the first

(1) (1880) 2 Mad., 317. (2) (1873) 10 Bom. H. C. Rep., 444.
(3) (1869) 4 Mad. H. C. Rep., 307.

natural born son for a share in the property. The claim was allowed as against the father and natural born son, but the High Court of Madras refused to disturb the arrangement made by the father in favour of his adopted son on the express ground that the evidence showed that the father had ample property to provide for all his after-born sons.

Even if the partition of 1875 had been between the three brothers, the Madras decisions would not apply to this case. The general rule of Hindu law, as expounded by the Mitákshara, Mayukha and the Smriti Chandrika, is that a son born after partition has no claim on the wealth of his separated brother. He has a preferential claim on the wealth of his parents. He can have a share of it with those brothers who lived in union with the father, or were reunited with him The separated brothers have no claim over this distributed parental share. A partition is limited to the interests of the person demanding it, and has no enforced general operation against those who desire to live in union[1].

The somewhat vague texts of Vishnu and Yajnyavalkya, which direct separated brothers to give a share to an after-born son, apply to sons who have no provision made for them, and have further been explained by the commentators as applicable only to the case of posthumous sons In the present case, there has been no partition between the brothers. The father only cut off one of his sons with a separate provision, and retained the rest of the property in his own charge and management for the sons of his younger wife. All branches of the family gave effect to this understanding for over twelve years, and it cannot now be disturbed at appellant's instance. His claim can only be made against respondents Nos. 2 and 3, who lived with their father in union, and with whom he himself has been all along living as a member of a joint family. For these reasons, which are not exactly those assigned by the lower Court, we confirm the decree with costs.

Decree confirmed.

(1) Brihaspati; Manu, Chapter 9, verse 216. Gautama. W. and B., p. 366.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899. BHAGAWAN RAMJI MARWADI, PLAINTIFF, *v.* GANU, DEFENDANT.*

February 27.

Dekkhan Agriculturist. Relief Act (XVII of 1879), Sec. 44—Application under section 44 becoming a decree—Deposit in payment of instalment not made—Decree—Application to sell decree absolute under Section 89 of Transfer of Property Act (IV of 1882)—Limitation Act (XV of 1877) Sch. II, Art. 179.

On the 21st October, 1891 the plaintiff and the defendant entered into an agreement before a conciliator for payment of principal and interest the four instalments mentioned. The agreement was forwarded to the Court on the 21st December, 1891, to be filed under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). Default having been made in the payment of the instalments the first of which became due on the 28th January, 1892, and the whole amount not paid, the plaintiff applied three years after for sale of the mortgaged property. The application was made on the 30th December, 1897, and was struck off the file for some formal defect on the 15th November, 1897. Subsequently on the 10th October, 1898, the plaintiff, having applied for an order absolute for sale under section 89 of the Transfer of Property Act (IV of 1882), questions arose as to the applicability of the section to agreements filed in Court under section 44 of the Dekkhan Agriculturists' Relief Act and as to whether

Held, that (1) agreements filed under section 44 of the Dekkhan Agriculturists' Relief Act, affecting to create a mortgage of property, are subject to the provisions of section 89 of the Transfer of Property Act (IV of 1882).

(2) Article 179, Schedule II, of the Limitation Act (XV of 1877) applies to applications under section 89 of the Transfer of Property Act.

Held further, that in the present case the application of September 1897 should be treated as a step in aid of execution.

REFERENCE by Ráo Sáheb Jamadan Damodar Dikshit, Subordinate Judge of Khed in the Poona District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff and the defendant entered into an agreement under section 44(1) of the Dekkhan Agriculturists' Relief Act (XVII of

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Civil Reference, No. 1 of 1899.

(1) Section 44 of the Dekkhan Agriculturists Relief Act (XVII of 1879) as amended by Act VI of 1895:—

"44. When the agreement is one finally disposing of the matter, the conciliator shall forward the same in original to the Court of the Subordinate Judge of the lowest grade having jurisdiction in the place where the agriculturist who is a party thereto resides, and shall at the same time deliver each of the parties a written

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1879) before the conciliator of Khed on the 21st October, 1894. The circumstances under which the agreement was made were as follows:—On the 12th June, 1885, the defendant passed a mortgage-bond to the plaintiff for fifty rupees. The bond was payable on the 12th June, 1887. The debt not having been paid as agreed, the parties appeared before the conciliator and entered into the aforesaid agreement, which ran thus:—

"That the defendant should pay to the plaintiff Rs. 100 by instalments, that the first instalment of Rs. 16 should be paid at the end of the month of Poush Shak 1816 (25th January, 1895), and that the remaining amount should be paid in six yearly instalments of Rs. 14 each, payable at the end of Poush of every subsequent year, that, in default of payment of any of the instalments, the plaintiff should recover the whole amount due by sale of the mortgaged property, and that the deficiency, if any, should be recovered from the defendant personally."

The agreement was submitted to the Subordinate Judge, and the necessary steps having been taken as laid down by the Dekkhan

notice to show cause before such Judge, within one month from the date of such delivery, why such agreement ought not to be filed in such Court.

(2) The Court which receives the agreement shall in all cases scrutinize the same, and if it thinks that the agreement is a legal and equitable one finally disposing of the matter and that it has not been made in fraud of the stamp or registration laws, it shall, after the expiry of the said period of one month, unless cause has been shown as aforesaid, order such agreement to be filed, and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed, and from which no appeal lies.

(3) If the said Court thinks that the agreement is not a legal or equitable one or that it does not finally dispose of the matter, or that it has been made in fraud of the stamp or registration laws, it shall of its own motion issue process for the attendance of the parties, and if after such inquiry as may be deemed necessary the Court finds that such agreement is a legal and equitable one finally disposing of the matter, and that it has not been made in fraud of the stamp or registration laws, it shall order such agreement to be filed, and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed, and from which no appeal lies.

(4) If, on the other hand, the said Court finds that the agreement does not constitute a legal or equitable agreement, or that it does not finally dispose of the matter, or that it has been made in fraud of the stamp or registration laws, it shall return the said agreement to the conciliator, and such conciliator shall thereupon be bound to furnish on demand to the parties or any one of them a certificate under section 46.

(5) The Court may in any case, for reasons to be recorded by it in writing, from time to time extend the period of one month allowed for showing cause under this section.

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Agriculturists' Relief Act, it was filed on the 21st December, 1894, and under section 44 *took effect as a* decree passed by the Court.

The defendant not having paid any of the instalments, the plaintiff on the 6th September, 1897, applied for the sale of the mortgaged property by presenting an application for execution in the form prescribed by section 235 of the Civil Procedure Code (Act XIV of 1882). The application was registered, and a notice under section 248 of the Civil Procedure Code was served on the defendant, but the plaintiff having failed to produce an extract from *Vasulbáki Patrak*, the application was struck off the file on the 18th November, 1897. Though the Transfer of Property Act (IV of 1882) came into force in the Bombay Presidency in January, 1893, the practice of making an application for a decree absolute under section 89 of the Act was not observed in the Court of the Subordinate Judge at the time when the darkhást was struck off. That practice having been subsequently introduced, the plaintiff on the 10th October, 1898, applied to have his decree made absolute.

The Subordinate Judge, being doubtful as to whether section 89 of the Transfer of Property Act was applicable and also as to whether the application was within time, as no application of the kind was made within three years since the whole amount became payable on default in the payment of instalments, he submitted the following questions to the High Court:—

1. Are agreements filed under section 41 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), if relating to sale of mortgaged property, subject to the provisions of section 89 of the Transfer of Property Act?

2. Does article 178 or 179 of Schedule II of the Limitation Act or any other rule of limitation apply to applications under section 89 of the Transfer of Property Act?

3. Can the darkhást of September, 1897, be considered as an application for execution, or a step in aid of execution, for the purposes of clause 4 of article 179 of Schedule II of the Limitation Act?

4. Can the execution of decrees proceed on applications for making decrees absolute? If not, what is the period of limitation for presentation of darkhásts, after the order absolute is made under section 89 of the Transfer of Property Act?

The opinion of the Subordinate Judge on the first question was in the affirmative, on the second in the negative, on the third in the negative, and on the fourth as follows:—

The execution cannot proceed upon an application for making a decree absolute under section 89, and that the period of limitation for presenting first darkhást for execution after the decree absolute is made is three years from its being made absolute under article 178 of Schedule II of the Limitation Act or article 179 of the said Act.

Shivram V. Bhandarkar (*amicus curiæ*) for the plaintiff:—As to the first question we contend that the agreements mentioned therein are not subject to the provisions of section 89 of the Transfer of Property Act. The question as to the applicability of the section becomes important on the point of limitation. If section 89 applies, then the question arises, what is the period of limitation applicable to such an application as this. Under section 44 of the Dekkhan Agriculturists' Relief Act the agreement itself becomes a decree. No fresh decree need be passed as contemplated by section 89 of the Transfer of Property Act. The agreement in this case, which was filed and became a decree, was neither a suit for foreclosure nor for sale, while section 89 of the Transfer of Property Act clearly contemplates such a suit.

[PARSONS, C. J. (ACTING):—The plaintiff now asks that the property should be sold.]

No doubt the plaintiff asks for a sale, but we contend that the property can be sold by virtue of section 41 of the Dekkhan Agriculturists' Relief Act and not under section 89 of the Transfer of Property Act, because there was no decree absolute and there was no suit for sale.

Next as to limitation. If section 89 of the Transfer of Property Act applies, then there is no period of limitation provided for such an application. It has been held that applications under section 89 of the Transfer of Property Act are not applications under the Civil Procedure Code, and consequently they are not applications in execution of decrees.

Vasudev G. Bhandarkar (*amicus curiæ*) for the defendant:—As the decree was passed after the Transfer of Property Act came into force, section 89 of the Act is applicable. Proceedings held before a conciliator stand on the same footing as an award made by arbitrators. It has been held that a decree passed on an award is governed by the provisions of section 89 of the Act. Unless a decree is made absolute, there can be no execution of it. The mort-

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gagee must apply to the Court to pass an order for sale. Under section 235 of the Civil Procedure Code, the mortgagee cannot at once ask for an order for the sale of the property. When an order absolute is made under section 89 of the Transfer of Property Act, the mortgagor's right to redeem becomes extinguished.

As to limitation, we contend that the Allahabad rulings should be followed. An application to pass an absolute order would be a proceeding in execution, and, therefore, it would be governed by article 179, Schedule II, of the Limitation Act. The term "execution" should be construed in reference to the provisions of the Civil Procedure Code, section 214. The original decree is merely a decree *nisi*. Under it the mortgagor may offer to redeem at any time before an order absolute is passed. The former application being not in accordance with section 89 of the Transfer of Property Act, was not an application in accordance with law, and, therefore, it was not a step in aid of execution.

The following authorities were cited in argument:—*Bai Manekbai* v. *Manekji*[1], *Nandram* v. *Babaji*[2], *Hafizuldin* v. *Abdool*[3]; *Ajudhia Pershad* v. *Baldeo*[4], *Tilack Singh* v. *Parsotem Proshad*[5], *Tara Prosad* v. *Bhobodeb*[6], *Poresh Nath Mojumdar* v. *Ramjadu Mojumdar*[7], *Eliyalath* v. *Krishna*[8], *Ranbir Singh* v. *Dirgpal*[9], *Chunni Lal* v. *Hirnam Das*[10]; *Muhammad Sulaman Khan* v. *Muhammad Yar Khan*[11], *Rup Lal* v. *Narain*[12], *Oudh Behari Lal* v. *Nageshar Lal*[13].

PARSONS, C. J. (ACTING) — The Subordinate Judge, in order to determine whether an application made to him was within time or not, has referred to this Court, under the provisions of section 617 of the Civil Procedure Code, the following four questions:—

1. Are agreements filed under section 11 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), if relating to sale of mortgaged property, subject to the provisions of section 89 of the Transfer of Property Act?

(1) (1880) 7 Bom., 213.
(2) (1897) 22 Bom., 771.
(3) (1893) 20 Cal., 755.
(4) (1894) 21 Cal., 818.
(5) (1895) 22 Cal., 921.
(6) (1895) 22 Cal., 931.
(7) (1889) 16 Cal., 246.
(8) (1889) 13 Mad., 267.
(9) (1893) 16 All., 25.
(10) (1898) 20 All., 302.
(11) (1894) 17 All., 39.
(12) (1890) 12 All., 539.
(13) (1890) 13 All., 278.

2. Does article 178 or 179 of Schedule II of the Limitation Act or any other rule of limitation apply to applications under section 89 of the Transfer of Property Act?

3. Can the darkhast of September, 1897, be considered as an application for execution, or a step in aid of execution, for the purposes of clause 4 of article 179 of Schedule II of the Limitation Act?

4. Can the execution of decrees proceed on applications for making decrees absolute? If not, what is the period of limitation for presentation of darkhasts, after the order absolute is made under section 89 of the Transfer of Property Act?

I am of opinion that such a general question as the 4th could not be referred, and that no one of the other questions can be said really to arise in the case.

The facts are these. The defendant had mortgaged his property to the plaintiff, and the plaintiff wanted his money. They applied to the conciliators, as they were bound to do under the provisions of the Dekkhan Agriculturists' Relief Act, and he effected an amicable settlement between them, the terms of which were as follows:—

"That the defendant should pay to the plaintiff Rs 100 by instalments, that the first instalment of Rs 16 should be paid at the end of the month of Poush Shak 1816 (25th January, 1895), and that the remaining amount should be paid in six yearly instalments of Rs 14 each, payable at the end of Poush of every subsequent year, that, in default of payment of any of the instalments, the plaintiff should recover the whole of the amount due by sale of the mortgaged property, and that the deficiency, if any, should be recovered from the defendant personally."

The Court to which this agreement was forwarded under section 44 of the said Act ordered it to be filed, and it then took effect as if it were a decree of the said Court. The defendant made default in payment of the first instalment, and the plaintiff, on the 6th September, 1897, asked for the sale of the property. Notice under section 248 of the Civil Procedure Code was given to the defendant, but in consequence of some formal defect the application was struck off the file on the 18th November, 1897. On the 10th October, 1898, the plaintiff made the present application to obtain an order absolute for sale under section 89 of the Transfer of Property Act, 1882.

The Subordinate Judge thinks that the application is within time, but, in order to know if he is right or not, he asks this

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Court, first, whether agreements filed under section 44 of the Dekkhan Agriculturists' Relief Act are subject to the provisions of section 89 of the Transfer of Property Act. The only argument addressed to us against the operation of the section was based on the fact that there has been no suit for sale. I do not, however, see that that is a very important distinction. The case of *Tara Prosad* v. *Bhobodeb*(1) shows that the section applies to a decree passed on an award of arbitrators filed in Court, and there seems to me no reason why it should not apply to the award of a conciliator. The point, however, important as it may be on the question as to when the defendant's right to redeem becomes extinguished, has no bearing on the question of limitation which arises in this suit.

He next asks whether article 178 or 179 of Schedule II of the Limitation Act or any other rule of limitation spplies to applications under section 89 of the Transfer of Property Act. There is a consensus of authority that article 178 does not apply—*Tiluck Singh* v. *Parsotein Proshad* (2), *Ranbir Singh* v. *Drigpal*(3) and *Bai Manekbai* v. *Manekji*(4). The Allahabad High Court held that article 179 applies—*Oudh Behari Lal* v. *Nageshar Lal* 5) and *Chunni Lal* v. *Hanam Das*(6), while the Calcutta High Court held that there is no period of limitation for such applications (*Tiluck Singh* v. *Parsotein Proshad*). If I had to decide the point I should be inclined to agree with the Allahabad High Court and hold that the application to obtain an order absolute was a proceeding in execution falling within article 179, and had, therefore, to be made within the time allowed by that article, counting from the date of the decree. Any positive decision, however, on the point is unnecessary.

The third question—"Can the darkhást of September, 1897, be considered as an application for execution, or a step in aid of execution, for the purposes of clause 4 of article 179 of Schedule II of the Limitation Act?"—is based upon a misconception of the darkhást itself. If the Subordinate Judge had only avoided technicalities and treated it as what it really is, namely, an ap-

(1) (1895) 22 Cal., 931.
(2) (1895) 22 Cal, 924.
(3) (1893) 16 All., 23.
(4) (1880) 7 Bom, 213.
(5) (1890) 13 All, 278.
(6) (1898) 20 All., 302.

plication to the Court for an order for sale of the mortgaged property, all his difficulties would have disappeared. There is no particular magic in the word "absolute," and it is not necessary that the application for the order should state the Act or the section thereof under which it is made. In the case of *Ajudhia Pershad* v. *Baldeo*[1], the application was in words identical with the present one, and it was held to be a good one. I would hold the same in the present case. The application of October, 1898, therefore, made within three years of the former one, is not time-barred even if article 179 be held to apply to it. If that article does not apply, then no limitation whatever applies, and the application cannot be time-barred. The above is, I think, a sufficient reply to all the questions put by the Subordinate Judge.

RANADE, J. —The first question contained in this reference relates to the point whether agreements under section 44 of Act XVII of 1879, when filed in Court, are subject to the provisions of section 89 of Act IV of 1882. The Subordinate Judge was of opinion that section 89 of Act IV of 1882 was applicable, and I think his view is correct. It is true section 2 of Act IV of 1882 expressly provides that nothing herein contained shall be deemed to affect the provisions of any enactment not hereby expressly repealed. Act XVII of 1879 is not among the repealed enactments, and, therefore, its provisions are not repealed. Section 74 of Act XVII of 1879, however, provides that, except in so far as it is inconsistent with the provisions of the Civil Procedure Code, that Code shall apply to all suits and *proceedings* under the Act. Act IV of 1882 and Act XIV of 1882 have to be read together as far as they relate to procedure. The provisions of Chapter XXXI of the Civil Procedure Code apply to the service of notice under section 103 of Act IV of 1882. The prohibition contained in section 43 of the Civil Procedure Code is controlled by the special provision of section 67 of Act IV of 1882. Other parallel instances may be cited of the close relation that exists between the two Codes. (See sections 6, 136, 97 of Act IV of 1882, and sections 266, 292, 295 of Act XIV of 1882.) So far, therefore, as the provisions of Act IV of 1882 relate to procedure, and they are not inconsistent with the special enact-

(1) (1894) 21 Cal., 818.

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ment of 1879, these provisions control proceedings under the special Act. Of course, where, as in sections 15A, 15B, 15C, 15D, 16, 20, 22, 70, the Dekkhan Agriculturists' Relief Act contains provisions directly inconsistent with those of the Transfer of Property Act, they are saved by section 2 (*a*) of Act IV of 1882.

There is no such inconsistency between section 44 of the Dekkhan Agriculturists' Relief Act and section 89 of the Transfer of Property Act. When an agreement effected by conciliators in respect of a mortgage-debt is filed in Court, it has the effect of a decree, and, as such decree, it is amenable to the provisions which relate to other decrees directing the foreclosure or sale of mortgaged property. The substantive effect of these sections 85—99 is to make ordinary decrees for foreclosure and sale decrees *nisi*, which allow an interval to the debtor to make the payment by requiring the creditor to apply for an order absolute before the mortgagor's right to redeem is for ever extinguished. This kind of relief it is one of the main objects of the Dekkhan Agriculturists' Relief Act to afford. There is, therefore, nothing inconsistent in the two sets of provisions. I would accordingly answer the first question in the affirmative.

The second question contained in the reference is whether article 178 or 179 applies to applications made by a judgment-creditor under section 89 for an order absolute. There has been no decision of this Court on the point. In *Bai Manekbai* v. *Manekji*[1], it was, however, held that article 178 only applies to applications under the Civil Procedure Code. The Calcutta and Allahabad High Courts have ruled that article 178 does not apply to applications under section 89. As regards article 179, there is an apparent conflict of opinion between the decisions of the Allahabad and Calcutta High Courts. After a careful consideration of the authorities which were cited before us, I am inclined to accept the view of the Allahabad Judges. The Calcutta High Court, while laying down in *Puran Chand* v. *Roy Radha Kishen*[2], that articles 178 and 179 did not apply to applications which were not made under the Code, has itself been led to observe in *Tiluck Singh* v. *Parsotein Proshad*[3], that if there is undue delay, the

(1) (1880) 7 Bom., 213.

(2) (1891) 19 Cal., 132.

(3) (1895) 22 Cal., 924.

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Courts will hold it to be a proof of laches, and disallow such applications. There seems to be no sufficient reason for holding that an application under section 89 is not an application for, or a step in aid of execution, and, as such, it must be treated as an application to which article 179 applies. In the present case this second question does not properly arise, as the application of September, 1897, was admittedly made within three years from the date of the decree, and it prevents the bar of limitation. It was indeed contended that as that application did not expressly pray for an order absolute, but was made under section 235, Civil Procedure Code, it was an order which had no legal effect, and did not save limitation. This contention seems too technical to be entitled to any support. The judgment-creditor's present application of October 1898, is obviously within time by reason of the proceedings he took in September, 1897.

The third question has been answered above.

The fourth question is apparently of a speculative character, and does not arise from the facts of the case. It, therefore, calls for no answer. It may, however, be suggested that there is nothing to prevent applications for an order absolute and for the execution of the darkhást from being made together or at short interval.

Order accordingly.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

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March 1.

PRANSUKHRAM DINANATH, A LUNATIC, BY HIS NEXT FRIEND HIS WIFE BAI FULKOR (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI LADKOR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Lunatic—Suit by wife as next friend, alleging husband to be a lunatic—Husband not an adjudged lunatic—Civil Procedure Code (Act XIV of 1882), Sec. 462—*Act XXXV of* 1858—*Practice—Procedure.*

Where a wife, alleging her husband to be of unsound mind, brought a suit as next friend, the Court ordered an inquiry (1) as to whether the husband was of unsound mind and (2) as to whether the suit was for his benefit.

* Second Appeal, No. 529 of 1898.

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PRANSUKHRAM v. BAI LADKOR.

SECOND appeal from the decision of R. J. C. Lord, Assistant Judge with full powers at Broach, confirming the decree of Ráo Sáheb G. R. Gokhale, Subordinate Judge of Vágra.

The plaintiff, who was alleged to be of unsound mind, brought this suit by his next friend, his wife Bai Fulkor, to recover possession of certain property.

The defendants contended (*inter alia*) that the next friend had no right to bring the suit under section 463 of the Civil Procedure Code (Act XIV of 1882), that the plaintiff had not been adjudged a lunatic; and that no certificate of guardianship had been obtained under Act XXXV of 1858.

The Subordinate Judge dismissed the suit, holding that the next friend was not entitled to maintain it, as there had been no valid adjudication of lunacy and she had not obtained a certificate under Act XXXV of 1858.

The Judge having confirmed the decree in appeal, the plaintiff preferred a second appeal.

Gokuldas K. Parekh for the appellant (plaintiff) :— There is nothing in Act XXXV of 1858 to prevent a suit being brought by a wife as next friend of her lunatic husband. The husband's property is to be protected, and the suit is for his benefit. It is true that no declaration with respect to the plaintiff's lunacy has been made, but such a declaration can be made at any time. Section 463 of the Civil Procedure Code is not exhaustive. It is just and equitable that such a suit should be allowed—*Nabbu Khan* v. *Sita*[1], *Porter* v. *Porter* [2]; *Venkatramana* v. *Timappa*[3].

Kalabhai Lallubhai for the respondents (defendants) :— A suit at the instance of a next friend can lie only when a person is adjudged to be a lunatic under Act XXXV of 1858—*Tukaram* v. *Vithal*[4]. We do not admit that the plaintiff is a lunatic. There has been no adjudication upon that point—*Beall* v. *Smith*[5].

(1) (1897) 20 All., 2.
(2) (1888) 37 Ch. Div., 420.
(3) (1891) 16 Bom., 132.
(4) (1889) 13 Bom., 656.
(5) (1873) L. R. 9 Ch., 85.

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PARSONS, C. J. (ACTING) :—The question raised in this appeal is whether Bai Fulkor had a right to file the suit as the next friend of her husband, who was alleged to be of unsound mind, but had not been adjudged to be so under Act XXXV of 1858 or under any other law for the time being in force. In *Tukaram* v. *Vithal* [1], a Bench of this Court expressed an opinion to the contrary on the strength of the rule stated in Daniell's Chancery Practice, 6th Edition, Vol. I, p. 116. In a more recent case, a Bench of the Allahabad High Court decided the point in the affirmative—*Nabbu Khan* v. *Sita* [2]. Their decision is based on the case of *Porter* v. *Porter* [3], and they point out that the rule on the subject in England is no longer the rule stated in Daniell's Chancery Practice. We see no reason why the principles of equity as applied in the practice of the Courts of England should not be observed in the Courts of this country in cases in which there is no law existent which lays down a different procedure. The Code of Civil Procedure is silent upon the point at issue here, and we must, therefore, act upon general principles and in conformity with the practice of the Court of Chancery (see *Venkatramana* v. *Timappa* [4]). The practice of that Court is clearly set out in the case of *Porter* v. *Porter* and in the other cases there cited. In it Cotton, L. J., says : "What is the principle on which the Court allows a person of unsound mind to sue by a next friend ? Where the person is incapable of acting for himself, the Court allows any one of the Queen's subjects to take proceedings on his behalf as regards that which is *primâ facie* for his benefit." Bowen, L. J., says: "It seems to me to be this that when there is a person of unsound mind, who, although not found to be of unsound mind by inquisition, nevertheless stands in need of the protection or the intervention of the Court as regards his property, real or personal, or as regards any portion of his property, then, supposing he would, if sane, be entitled to the intervention of the Court, a third person, a stranger, may come forward and do that which is clearly for the benefit of the person of weak mind ;" and in applying the principle he says: "The Court ought to be satisfied, so to speak, of the

(1) (1889) 13 Bom., 656.
(2) (1897) 20 All., 2.
(3) (1888) 37 Ch. Div., 420.
(4) (1891) 16 Bom., 132.

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title of the next friend to intervene, and it ought to be satisfied that the person is of unsound mind and that he stands in need of protection as regards his property, and it ought to be shown that it would be for his true interest that the Court should exercise its jurisdiction."

In the present case, the suit has been summarily dismissed, so that we do not know whether Pransukhram, on whose behalf the suit has been brought, is a person of unsound mind or not. That point will, therefore, have to be enquired into. The suit is brought to set aside certain deeds said to have been executed by him when of unsound mind, and under undue influence; it is, therefore, *primâ facie* founded on a good and beneficial cause of action. In *Beall* v. *Smith* [1] it is said that the more common case of the Court's interference is where the incompetent person by his next friend seeks to set aside instruments or other gifts obtained by persons taking fraudulent advantage of his mental weakness. The point is one on which we must order enquiry in the circumstances of the present case, and we think, in the words of Cotton, L.J., in the above cited case, that the *onus* must be placed on those who suggest that the action is not duly constituted to show that it cannot be really for the benefit of the person of unsound mind. We, therefore, frame these issues, namely:—Is Pransukhram a person of unsound mind? Do the defendants prove that the suit instituted by his wife as his next friend is not for his benefit? and ask the Judge of the lower appellate Court to take evidence and find on them, and certify his findings to this Court within two months.

Issues sent down.

(1) (1873) L. R. 9 Ch., 85.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Tyabji

IN RE NARAYEN SADASHIV KALE.* 1899. *March* 1.

Regulation II of 1827, *Sec.* 54—*Pleader and client—Pleader's absence from Court owing to his temporary appointment as a Subordinate Judge—"Necessary cause."*

On the day fixed for the hearing of a suit, neither the plaintiff nor his pleader was present; the defendant not having been served was also absent. Plaintiff's pleader, however, sent intimation to the Court in writing that he had been appointed to act as a Subordinate Judge, and as he was going that day to join his appointment, he was unable to attend the Court. He, therefore, requested that the case should be adjourned till his return, or that a notice be issued to his client to enable him to make the necessary arrangements for the conduct of his case.

Held, that the pleader, having been temporarily appointed to act as a Subordinate Judge, was unable to attend the Court in consequence of a "necessary cause" within the meaning of section 51 of Regulation II of 1827, and as he had sent the necessary notification in writing to the Court, the suit should not be dismissed, but adjourned for a reasonable time.

REFERENCE by Ráo Bahádur Gangadhar Vishnu Limaye, First Class Subordinate Judge of Belgaum, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was as follows:—

"The plaintiff sued for rent of a house. When it came on for hearing, the plaintiff and his pleader were called, but both were absent. The defendants not being served were also absent. A report of the pleader was later submitted to the Court, stating that being appointed to act as Subordinate Judge, he was going away that day to join his appointment, and requesting that all his cases should either be adjourned till his return, or, if this could not be conveniently done, a notice should be issued in each case to the party concerned to enable him to make the necessary arrangements for the conduct of his case."

The questions referred for the High Court's opinion were:—

1. Whether the procedure laid down in section 54, clause 1, of Regulation II of 1827, should be followed in such a case, or whether the suit should be dismissed for default?

* Civil Reference, No. 2 of 1899.

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2. Whether, if the said section be applicable to the case, it is necessary to issue a notice to the party concerned?

His opinion on the second question was in the negative.

Section 51 of Regulation II of 1827 provides as follows:—

"If a pleader is unable to attend the Court in consequence of indisposition or *other necessary cause*, he shall notify the same to the Court in writing, in which case proceedings in the suit shall be stayed for such time as the Court deems reasonable, to enable the party to transfer by endorsement or otherwise his power-of-attorney (either temporarily or until the suit is determined) to another pleader."

The reference was argued before a Division Bench (Candy and Tyabji, JJ.).

Sadashiv R. Bakhle, as *amicus curiæ*, for plaintiff.

Dattatrya A. Idgunji, as *amicus curiæ*, for defendants.

CANDY, J:—We think that the pleader, who was temporarily appointed to be a Subordinate Judge, was unable to attend the Court in consequence of a "necessary cause." Section 54 of Regulation II of 1827 was, therefore, applicable, and in accordance with the provisions of that section the pleader sent the necessary notification in writing to the Court. He could, under the circumstances, have appointed another pleader in his behalf under Civil Circular 18 (*i*), but according to the practice, which is apparently at present prevailing in the Sub-Court, a pleader who is unable to attend the Court, owing to his temporary appointment as a Subordinate Judge of another Court, is not bound to appoint another pleader to conduct his cases in the Court in which he was practising. As it is also the present practice for the Court to issue notices to the parties in cases falling under section 54 of Regulation II of 1827, we think that there were in the case, now referred by the Subordinate Judge, reasons, which he could have recorded under section 98 of the Civil Procedure Code, for not dismissing the suit.

Order accordingly.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

KISHORE (ORIGINAL DEFENDANT), APPELLANT, *v.* LAKSHMANDAS RAGHUNATHDAS AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1899. *March* 2.

Procedure Code (Act XIV of 1882), Sec. 539—Public, religious and charitable trust—Charity—Hindu temple, with a dharmashala and sadâvart attached to it—Trustee—Constructive trustee—His liability—Right to sue—Limitation.

A Hindu built a temple in honour of the deity Shri Pandurang, to which were attached a *dharmashâla* and a *sadâvart* for feeding travellers and giving alms to the poor. For the maintenance of the temple and the charities connected with it, he dedicated certain property by a deed of gift under which he constituted himself a trustee for life and appointed a *panch* to act as his successors in the trust. During his life-time he managed the temple as provided in the deed. On his death in 1897, the *panch* did not take charge, but his son (the defendant) assumed the management. The temple was open to the Hindu community.

In 1894 the *pujâri* of the temple and five other worshippers of the idol filed this suit under section 539 of the Code of Civil Procedure (Act XIV of 1882) with the sanction of the Advocate General, for removing the defendant from the management of the temple on the ground of his misconduct and mismanagement of the trust property.

The defendant pleaded (*inter alia*) that the property was not a public, religious and charitable trust, that he was not a trustee, that the plaintiffs had no right to sue, and that the suit was time-barred.

Held, (1) that having regard to the fact that a certain number of the public had always used the temple, that there was attached to it a *dharmashâla*, and that the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadâvart*, the intention of the founder was to devote the property to public, religious and charitable purposes;

(2) that although the defendant was not appointed a trustee, yet by taking charge of the endowment, and purporting to manage it as temple property, he made himself a constructive trustee, and was liable, as such, to the beneficiaries;

(3) that the plaintiffs were entitled to maintain the suit under section 539 of the Code of Civil Procedure (Act XIV of 1882);

(4) that the suit was not time-barred, as with every fresh breach of the constructive trust, or whenever the direction of the Court was deemed necessary, a fresh cause of action arose.

* Appeal, No 19 of 1898.

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JUGAL-KISHORE v. LAKSHMAN-DAS.

APPEAL from the decision of W. H. Crowe, District Judge of Poona.

Suit under section 539 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiffs sued, with the sanction of the Advocate General, under section 539 of the Civil Procedure Code (Act XIV of 1882), for the removal of the defendant from the management of a public charity, and for the settlement of a scheme under the directions of the Court for the future management of the charity.

Plaintiffs alleged that there was a temple of Shri Pandurang in Poona which was built by defendant's father Purshotamdas Ambaidas, for the use of the public, about fifty years ago. To this temple were attached a *dharmashála* and a *sadávart*.

For the maintenance of this temple, for feeding travellers, and for giving alms to the poor, the defendant's father assigned certain property by a deed of gift, dated 18th December, 1859, under which he constituted himself a trustee for life; and appointed a *panch* to act as his successors in the trust after his death.

On 18th January, 1867, Purshotamdas executed another deed of gift by which he confirmed and ratified the provisions of the former deed, and appointed a *sarpanch* or head trustee, under whose advice and guidance the other trustees were to act in the management of the trust after his death.

Purshotamdas managed the trust property during his life-time in accordance with the provisions of the deed of gift. He died in 1867.

On his death none of the trustees appointed by him took charge of the temple property. The defendant (the son of Purshotamdas) took possession of the property and continued in management till 1894, when the present suit was brought.

Plaintiffs alleged that the defendant was wasting and mismanaging the trust property, and was acting in total disregard of the interests of the charity. They, therefore, sought to remove him from the management.

Plaintiff No. 3 was the *pujári* of the temple, and plaintiffs Nos. 1, 2, 4, 5 and 6 were devotees and worshippers of the idol.

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Defendant pleaded (*inter alia*) that the property in dispute was not a public, religious and charitable trust; that the plaintiffs had no right to sue; that the suit was time-barred; that he was not a trustee of a public charity; and that section 539 of the Civil Procedure Code (Act XIV of 1882) did not apply.

The District Judge overruled these objections, and held that the defendant's conduct was such that it was necessary, in the interests of the charity, to appoint trustees and settle a scheme for the future management of the trust. A scheme was accordingly framed under the directions of the Court, which was incorporated in the decree.

Against this decree defendant appealed to the High Court.

Dattatrya A. Idgunji for appellant.

Nagindas Tulsidas for respondent.

FULTON, J.—The circumstances out of which this suit has arisen are as follows —

On the 18th December, 1859, one Purshotamdas executed a deed, the material portions of which are translated as follows —

"I am become old and am aged about 71 years. As my first wife's son Jugalkishore *alias* Bapubhai does not conduct himself in obedience to me, I do not feel confident either that he will perform the service of the deity after my death or that he will be of any service to me. For these reasons, and because the property which I gave away in gift is my self-acquisition, I had no ancestral estate, all my belongings are my own acquisition—Knowing this, with the object that the estate should be devoted to good purposes for securing salvation, I give away in the name of Krishna to Shri Pandurang Murti, god of gods, of my free-will and accord, the property, moveable and immoveable, as set out below —

"1 The temple which I have built.

* * * *

"All the above property is dedicated to Shri Pandurang Dev, the god of gods. Neither I, nor any descendants, nor my creditors, nor anybody else has a right or claim to it. In the said temple there is a two-storied sopa for the *pujári* to lodge in. Now, the priests Keshavbhat and Bhaubhat and their mother Rajabai and Vithal live there whom I had appointed as the priests. But if they misconduct themselves, others are to be appointed in their stead. To defray the expenses of offerings to the deity and the light near the idol Rs. 3-8-0 are to be given away every month, and a *dhotar joda* with Rs. 4 a year and to Rukhmini Rs 5 and a *patal*. Thus with these items to defray

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the expenses, the god's *nevadya* and *tikal puja* is performed. The *pujari* has no concern in the other things.

"The other expenditure to be incurred is as follows:—

"These are to be met by the rent realised from the houses mentioned above. After my death, the *panch* named below are to realise the rents of the houses and after incurring the expenses necessary for repairs, &c., to apply them to the above purposes. Out of the balance, travellers are to be fed and a *sadávart* is to be kept which I shall do during my life After my death, the *panch* mentioned below are to conduct it.

"I have kept a shop in the name of Vithoba in the shop in which I live. The house is dedicated to Nathji, god of gods of Udeypur. The capital of the shop has been credited in the name of the gods. I have been serving as gumásta in this shop.

"The remuneration for that is Rs. 225, which I shall take and manage the shop with honesty and serve its interests. Shri Vithoba, god of gods, is the owner of the profits made in the business. I shall accordingly manage the shop during my life-time. And during my life-time I shall manage the property, both immoveable and moveable. After that the *panch* named below are to continue such management for ever. With this object, I have named the *panch*. * * The said *panch* are to realize the rent and to continue the *dharmadritya* for ever. After my death the above named *panch* should take the rent and spend the money with economy. None of them should misappropriate the amount or apply any part of it to his own use. The *panch* are to supervise the estate and its income and to spend as above detailed. This is all the right of the *panch*. Shri Pandurang is the owner of the whole estate including the shop.

* * * *

"During my life-time I shall manage the said houses, sites and the temple, realize the rents and spend them as above. After my death, the *panch* are to deal with them as owners. To the said houses, sites, temple, money, and jewellery and pots, neither I nor my heirs, descendants, creditors, or executors or wife or anybody else has any right. Shri Pandurang, god of gods, is the owner for ever. The *panch* are appointed to carry on the vahivat.

"The maintenance and support of my Jugalkishore *alias* Bapubhai and my wife is provided for in my vyavasthapatra. All the details are set out therein."

Again on the 18th January, 1897, Purshotam executed another deed or vyavasthapatra to the following effect:—

"As the temple of Shri Pandurang has been built together with the out-house, &c., the same should be in working order. I, therefore, gave over in charity to Shri Pandurang three houses, together with the compound site. The said deed of gift was executed on Margshirsh Shud 9, Shake 1781. I have no ownership over them. In order that the worship of the deity may be duly

performed and that there may be *naivedya*, &c., a sopa with two storeys has been built, &c. * * In the deed of gift a *panch* is appointed to manage. Of these Shaligram is dead Thus there are only four members of the *panch* and there is no *sarpanch* I, therefore, appoint Viziarungam Aya the 5th *sarpanch*. The following gentlemen with the addition of Viziarangam as *sarpanch* are competent to realize the rents, remove tenants, &c. During my life-time I shall look to the management myself. After me the said *panch*, with the advice of *sarpanch*, shall continue the management. Nobody else is to have any voice in it."

Purshotam died in 1867. During his life-time he managed the temple as provided in the deed, but on his death the *panch* did not take charge, and his son Bapubhai assumed the management In 1889, the members of the *panch* filed a suit to eject Bapubhai, but it was rejected as time-barred. However, in their decision on appeal, the High Court remarked that the question whether the defendant could in fact be regarded as a trustee for the temple and be removed for misconduct was not before them—*Kupusawami* v. *Jugalkishore*[1].

The present plaintiffs have now filed this suit as relators under section 539 of the Civil Procedure Code, with the sanction of the Advocate General, and in the interlocutory judgment of the 15th April, 1896, this Court held that the claim was not barred by the decision in the former suit. We agree with the District Judge in thinking that, if there is a validly constituted trust created for religious purposes, the plaintiffs have such an interest therein as entitles them to sue with the consent in writing of the Advocate General. On this point we have nothing to add to Mr. Crowe's remarks.

The next question to be considered is whether Purshotam was competent to create the trust. In the deed of 1859 it is recited that the property is self-acquired, and the only evidence to contradict this statement is that of the defendant himself. This evidence is not, we think, sufficiently reliable to justify us in disbelieving the statement in the deed which more probably represents the real facts of the case. The defendant has never disputed the fact of the endowment, and in this appeal it has not been disputed that both the deeds are genuine. He admits that the

(1) P. J. for 1892 p. 155.

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temple was built by his father fifty-five years ago and that the rent of certain houses is to be spent on it, and his acquiescence for so long a period in the principal provisions of the endowment furnishes a strong ground for believing that in making it the father was dealing with his own funds and not with joint funds or property.

The endowment itself, we think, has rightly been treated as for public, religious and charitable purposes. It was contended that under the deed it was only intended to endow a private temple for the use of the family and not for the public. But having regard to the fact that a certain number of the public have always used the temple, that there is attached to it a *dharma-shála*, and that the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadávart*, we think it is clear that the intention of the founder was to devote the property to public, religious and charitable purpose.

Lastly, we think that although the defendant was not appointed a trustee by the deceased, yet by taking charge of the endowment and purporting to manage it as temple property, he made himself a constructive trustee or, to adopt the phrase occasionally used in English decisions, a trustee *de son tort*[1]. His deposition shows that he knew the property was devoted to the temple and he applied to the Municipality to exempt it from taxation on the ground that it was devasthán. In *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram*[2], West, J., in discussing the position of persons who, while holding property dedicated to religious purposes, denied their liability as trustees, said. "Those who take physical possession of the one as of the other kind of property (cash, jewels or land) incur thereby a responsibility for its due application to the purposes of the foundation—compare *Griffin* v. *Griffin*[3]; *Mulhallen* v. *Marum*[4]; *Aberdeen Town Council* v. *Aberdeen University*[5]. They are answerable as trustees even though they have not consciously accepted a trust, and a remedy may be sought against them for maladministration by a suit open to

(1) *Hope* v. *Liddell* (1856) 21 Beav., 183. (3) (1801) 1 Sch. & Lef., 352.
(2) (1887) 12 Bom., 217 at p. 265. (4) (1843) 3 D., & War., 317.
(5) (1877) 2 App. Cas., 544.

any one interested as under the Roman system in a like case by means of a *popularis actio*." The principle contained in this passage seems applicable to the present case. The property appropriated to this devasthán remains the subject of a trust, and the defendant who, without authority, undertook its management is liable to the beneficiaries. An express decision on this point will be found in the case of *Rackham* v. *Siddall*[1] in which a lady who, without authority, had assumed the duties of trustee was held liable. In that case Vice-Chancellor Shadwell said as follows (p. 305):—"Now I must say that it would be a most glaring violation of justice if I were to decide that she was not answerable. If she had pleased, she might have refused to act: but, as she assented to act she was bound to act properly, and she cannot screen herself from the consequences of her acts, merely by saying that she was not authorized to act."

On appeal the same doctrine was enunciated equally clearly by Lord Cottenham, L. C., as follows[2]:—"There is indeed no question about it: she took on herself, as the decree recites, to act as trustee; and if a party takes on himself to act as trustee and to sell a trust estate and receives the purchase-money, it will not do for that party, whether the purchase-money remains in his pocket, or he hands it over to somebody else, under circumstances that leave him liable, to say 'I do not think that, under the circumstances, I was, strictly speaking, a trustee; somebody else was, and, therefore, you, the party who is *cestui que trust*, cannot call on me for the payment of the purchase-money.' It is quite clear that could not be listened to."

We think, then, that the plaintiffs are entitled to maintain this suit under section 539 against the defendant. We are also of opinion that it is not time-barred, for we consider that with every fresh breach of the constructive trust, or whenever the direction of the Court was deemed necessary, a fresh cause of action arose. The wording of section 539 is clear. The public may tolerate for a time irregularities in the management of the endowment in which they are interested, but they do not thereby lose their rights, for the law expressly provides that whenever the direction

(1) (1848) 16 Sim., 297 at p. 305. (2) (1849) 1 M. and G., 607 at p. 621.

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of the Court is deemed necessary they may with the proper sanction institute a suit. In the present case directions are clearly necessary, as the defendant disputes his obligations and has mismanaged the property as explained by the District Judge. No objection was taken in argument to the details of the scheme. We confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

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March 2.

MOHIDIN AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SHIVLINGAPPA (ORIGINAL PLAINTIFF), RESPONDENT *

Easement—Customary rights—Custom of burial—Local custom—Right claimed by a certain section of Mahomedans to bury their dead in a certain locality—Right of burial

Where a certain section of the Mahomedan community had been for many years in the habit of burying their dead near a dargá in plaintiff's land, and the plaintiff sued for an injunction restraining them from exercising this right in future,

Held, that the right of burial claimed by the defendants was not an easement, but a customary right, which being confined to a limited class of persons and a limited area of land, was sufficiently certain and reasonable to be recognized as a valid local custom.

SECOND appeal from the decision of L. Crump, Assistant Judge of Sholapur-Bijápur.

The plaintiff sued for an injunction restraining a certain division of the Mahomedan community at the village of Bágevádi from burying their dead in his land.

The defendants pleaded that they had been burying their dead in the land in dispute for over a 100 years; and that they had acquired an easement by such continued user.

The Subordinate Judge found that there was a dargá in the land in suit, that there were several tombs round about the dargá, and that the defendants had been exercising the right of burial for a long time beyond the memory of any living man.

* Second Appeal, No 411 of 1898.

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He, therefore, held that the easement claimed by the defendants was proved, and dismissed the suit.

On appeal, the Assistant Judge reversed the first Court's decree. In his judgment he said:—

"I do not, however, think that defendants can be held to have acquired any prescriptive right. The right which they claim is clearly not an easement in fact, it does not bear the smallest resemblance to an easement, neither can it be said to be a '*profit a prendre*' The reasons which lead me to hold that such a right as defendants claim cannot be acquired by prescription are these *First*, they do not set any limit whatever to the space which they wish to use as a burial-ground, they say, 'we are entitled to bury our dead in Survey Nos 1134 and 1135' (for the latter see companion Appeal No. 100 of 1896). It is impossible that any right can have been acquired by immemorial usage to bury corpses in areas which are only modern conventions There is not the smallest attempt to limit their right in any way, and it is obvious that serious injury must result to plaintiff if the whole of his land is to be used for this purpose

"*Secondly*, it is perfectly clear that the exercise of this so called right, if persisted in, will ultimately destroy all the profits to be derived from plaintiff's land, as the whole survey number will, in the course of time, be covered with tomb-stones * * *.

"I find no instance of any similar right being recognized by a Court of Law in India The case which appears most similar is that of *The Secretary of State for India* v. *Mathurabhai* ((1889) 14 Bom., 213), but the circumstances there are different, in that case it was held that the inhabitants of a village could acquire a right to graze cattle by prescription as against the Crown. The inhabitants of a village form a corporate unit, and the right of pasture is not one which entirely destroys the produce of the ground. Here we have an undefined number of persons belonging to a particular division of the Mahomedans of the village asserting a prescriptive right which, as I have shown, must eventually destroy plaintiff's profit of his land In other respects, the case I have quoted is an authority for holding that the plea set up by the defendants is bad on account of its vagueness, as they have entirely failed to point out over how much of the land they have acquired the right which they claim.

"I, therefore reverse the decree of the lower Court and order that a perpetual injunction, issue to defendants, restraining them from burying their dead in the land."

Against this decision defendants preferred a second appeal to the High Court.

R. A. Desai for appellants (defendants):—It is found as a fact that the defendants have been burying their dead in the land in

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suit from time immemorial. They have thus acquired a right in the nature of a customary easement. That such a right can be acquired by prescription is shown by section 18 of the Easement Act (V of 1882)—*Mamman* v. *Kaar Sen* [1]; *Kaar Sen* v. *Mamman* [2]; *Fitch* v. *Rawling* [3]; *Earl of Coventry* v. *Wilkes* [4]; Mitchell on Easement Act, page 163; Mitra on Limitation and Prescription, pages 100, 401 (3rd edition).

D. P. Kirloskar for respondent (plaintiff):—The right claimed by the defendants cannot be acquired by prescription. It is not a customary right. The alleged custom of burial is both uncertain and unreasonable. The defendants do not set any limit to the space which they want to use as a burial-ground. If such a right were allowed, the whole of our land will in course of time become quite unfit for agricultural purposes. It will be all covered over with tombs. Such an unreasonable custom will not be recognized in a Court of justice—*Kaar Sen* v. *Mamman* [5]; *Lalchmepat Singh* v. *Sadaulla* [6].

FULTON, J.:—In this case the learned Assistant Judge has found that it is satisfactorily established that a certain division of the Mahomedans of the village (of Bágevadi) have been for many years in the habit of burying their dead, as occasion arose, round about the dargá in the land in dispute. But he has granted the plaintiff's claim for an injunction restraining the defendants from burying their dead in future in any part of Survey No. 1134, first, because the defendants do not set any limit whatever to the space which they wish to use as a burial-ground, and, secondly, because it is perfectly clear that the exercise of this so-called right, if persisted in, will ultimately destroy all the profits to be derived from plaintiff's land, as the whole survey number will, in course of time, be covered with tomb stones.

Now we agree with the Assistant Judge that the right claimed by the defendants is not an easement, as it is not dependent on the possession of any dominant heritage. But by section 26 of Regulation IV of 1827 the Courts are bound, in the absence of

(1) (1893) 16 All., 178.
(2) (1895) 17 All., 87 at p. 91.
(3) (1795) 3 R. R., 125.
(4) (1863) 9 L. T. (N. S.), 384.
(5) (1895) 17 All., 87
(6) (1882) 9 Cal., 698.

Acts and Regulations, to decide according to the usage of the country, and the validity of customary rights other than easements is preserved by section 2 of the Easements Act. We fully concur in the remarks of the Allahabad High Court in *Kuar Sen* v. *Mamman*[1] on the subject of customary rights. As they appear to state the law very clearly, we think it advisable to quote the passage (p. 91) at length —

"As such a local custom as is now set up on behalf of the defendants" (the right of using a certain chabutra as a sitting place and during the Moharram of exhibiting thereon the 'tazias' and 'alums' and placing a 'takht' on it) "excludes or limits the operations of the general rule of law that a proprietor or other person lawfully in the possession of land, and whose rights are not controlled or limited expressly or impliedly by Statute law, by grant, or by contract, has an exclusive right to the use or enjoyment of his land for all purposes not injurious to the rights of his neighbours, it is necessary that those setting up such a custom as that in the present case should be put to strict proof of the custom alleged by them. A local custom to have the effect of excluding or limiting the operation of the general rules of law must be reasonable and certain. A local custom as a general rule is proved by good evidence of a usage which has obtained the force of law within the particular district, city, mohálla or village, or at the particular place, in respect of the persons and things which it concerns. Where it is sought to establish a local custom by which the residents or any section of them of a particular district, city, village or place are entitled to commit on land not belonging to or occupied by them, acts which, if there was no such custom, would be acts of trespass, the custom must be proved by reliable evidence of such repeated acts openly done, which have been assented and submitted to, as leads to the conclusion that the usage has, by agreement or otherwise, become the local law of the place in respect of the person or things which it concerns. In order to establish a customary right to do acts which would otherwise be acts of trespass on the property of another, the enjoyment must have been as of right, and neither by violence nor by stealth,

(1) (1895) 17 All, 87.

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nor by leave asked from time to time. We cannot in these provinces apply the principle of the English Common Law that a custom is not proved if it is shown not to have been immemorial. To apply such a principle as we have been urged by the counsel for the appellant to do, would be to destroy many customary rights of modern growth in villages and other places. The Statute law of India does not prescribe any period of enjoyment during which, in order to establish a local custom, it must be proved that a right claimed to have been enjoyed as by local custom was enjoyed And in our opinion it would be inexpedient and fraught with the risk of disturbing perfectly reasonable and advantageous local usages regarded and observed by all concerned as customs to attempt to prescribe any such period. In our opinion, a Court should not decide that a local custom, such as that set up in this case, exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application."

Now that seems to us a very fair statement of the law on the subject, but when applying the tests of reasonableness and certainty we must look carefully to the circumstances of the case and not be led too easily to hold that a custom is bad because the parties have failed in their pleadings to define it with accuracy. Here the defendants have, it is true, failed to set any limit to the space which they wish to use as a burial ground. But we must not confuse their wishes and their rights. They wish for the privilege of burial all over Survey No. 1134. Their right according to custom as found by Assistant Judge seems to be to bury round about the dargá. Because they fail to prove all they wish, there seems no reason for denying them the rights which they establish. A plaintiff may claim Rs. 1,000, but if the evidence shows that he is only entitled to Rs. 100, he will get a decree for the latter sum albeit his claim as stated is not fully proved. What then is the uncertainty connected with this right of burial? There is no uncertainty as to the class of persons who have been in the habit of burying near the dargá. It is not denied that the defendants belong to that class. There is no uncertainty as to the nature of the custom which is to bury as occasion arises near the dargá –not of course in the tombs

previously occupied—but in the land described by the Assistant Judge as round about the dargá. The only point which can be said to be uncertain relates to the limits within which burials must be made. Those limits have not been defined. But we think that they are sufficiently indicated by the restriction of the right to a limited class and by the obligation to bury near the dargá. As some definition now seems necessary owing to the unreasonable claims set up by the defendants, we think that it can fairly be drawn from considerations of necessity and proximity to the dargá. It is easy, of course, to see that there is no custom of burial at a distance from the dargá. It is equally easy to see that there is a custom of burial near the dargá which the plaintiff is not entitled to disregard. The right then may be defined as that of the burial of members of the class as near the dargá as may be. On this point the remarks of Baron Cleasby in *Hall* v. *Nottingham*[1] seem applicable: "Looking to the nature and origin of such customs it would be unreasonable to expect any precise certainty as to what should be enjoyed as a matter of right. If at the present time the inhabitants all met to discuss and determine such a matter, it would be unreasonable to expect them to be very precise as to the enjoyment which they were to have." In the present case if the elders of the village met, all they could say would be that a certain number of Mahomedan families had long been in the habit of burying near this dargá. But we think that would be enough. It would be unreasonable to expect of the defendants greater certainty. The plaintiff, however, may fairly claim an injunction restraining them from using their right of burial in a manner to do more injury to him than the nature of that right requires, or, in other words, he may ask that they may be compelled to bury as near the dargá as possible.

Next we have to consider the second objection and say whether this custom of burial can be disallowed as unreasonable. We hesitate to arrive at such a conclusion. Amongst all races that bury their dead, this right of burial in a particular locality is one that is most dearly prized, and although the plaintiff's land may be rendered practically useless, if these tombs are

[1] (1875) 1 Ex. D., 1.

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multiplied exceedingly, the contingency seems too distant to justify the Courts in summarily putting an end to the right. In *Hall* v. *Nottingham* the possibility that the custom there set up might have the effect of taking away from the owner of the freehold the whole use and enjoyment of his property, was not thought a sufficient ground for disallowing it. If a custom which allows all lawful games to be played on another person's land at all times of the year is not an unreasonable custom, it seems impossible to hold that the limited custom established by the defendants is bad. The criterion of "reasonableness" by which the case of *Lutchmeeput Singh* v. *Sadaulla Nushyo*[1] was decided, may have been a good one as regards the alleged right of an indefinite number of persons to fish in the Bhils of a private owner; but it cannot be extended as a matter of law to all customs; for, as shown in *Hall* v. *Nottingham*, a custom may be good though its exercise may have the effect of depriving the owner of the soil of the whole use and enjoyment of his property. Here the defendants are entitled to claim for a limited class the right of burial in one corner of a field near a dargá. The mere possibility that after many years the number of tombs may have increased so much as to deprive the owner of the use of his field, or of a large portion of it, seems too remote to enable us to describe as unreasonable the custom in dispute.

We, therefore, amend the decree by directing that a perpetual injunction issue to defendants restraining them from burying their dead in Survey No. 1134 otherwise than as authorized by custom, namely, of burying near the dargá. The parties severally to pay their own costs throughout.

Decree amended.

(1) (1882) 9 Cal 698.

APPELLATE CIVIL.

Before Mr Justice Candy and Mr. Justice Fulton.

MANGALDAS (ORIGINAL PLAINTIFF), APPLICANT *v* JEWANRAM AND OTHERS (ORIGINAL DEFENDANTS), OPPONENTS *

1899.
March 2.

Specific Relief Act (I of 1877), Sec. 9—Right of way—Immoveable property—Right of way is not immoveable property within the meaning of section 9 of the Act.

A right of way is not "immoveable property" within the meaning of section 9 of the Specific Relief Act (I of 1877).

APPLICATION under section 622 of the Civil Procedure Code (Act XIV of 1882) against the decision of Ráo Sáheb S. B. Gadgil, Subordinate Judge at Bassein.

The applicant filed a suit under section 9 of the Specific Relief Act (I of 1877) to be restored to the possession of a right of way, which, he alleged, was obstructed by the defendant's erecting a wall across the way in dispute.

The Subordinate Judge of Bassein dismissed the suit, holding that a right of way was not included in the term "immoveable property" in section 9 of Act I of 1877.

Against this decision plaintiff applied to the High Court under its Revisional Jurisdiction.

A rule *nisi* having been granted,

Inverarity (with him *Manekshah Jehangirshah*) showed cause.

Macpherson (with him *R. R. Desai* and *B. F. Dastur*) *contra.*

CANDY, J.:—The question is whether a right of way is "immoveable property" within the meaning of section 9 of the Specific Relief Act according to the definition in the General Clauses Act. I agree with the Subordinate Judge that a right of way is not a "benefit to arise out of land," but it does not, therefore, follow that a right of way is not immoveable property. The word 'include' in section 2 of the General Clauses Act is enumerative, not exhaustive. A right of way would certainly seem to be an interest in immoveable property. But whether an easement proper (such as is the right of way claimed in this case) can be strictly said to come within the definition of immoveable

* Application, No. 209 of 1898.

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property or not, there is, in my opinion, something repugnant in the subject or context of section 9 of the Specific Relief Act which prevents such an effect being given to the definition. The repugnancy arises because it appears that the nature of the relief provided by the Act is repugnant to the character of the property in question. The nature of the relief here must be by injunction. In a case like the present one, if the suit will lie, and if the Subordinate Judge finds that the plaintiff has been dispossessed of his property (his right of way) within six months, then the Subordinate Judge is bound to give a decree awarding him possession of the property, that is, the Subordinate Judge is bound to grant an injunction, *viz.*, by preventing defendant from obstructing the right of way. But the granting of an injunction is, under Part III of the Act, subject to certain restrictions. It is subject to the discretion of the Court (section 52). It can only be granted where the invasion of the right is such that pecuniary compensation would not afford adequate relief. It is possible to imagine a case where a right of way has been obstructed, but there still exists a right of passage for plaintiff, though over a longer way, and the Court may deem it proper to allow the obstruction to remain and to award pecuniary compensation for the diversion. In the case of another easement, *viz.*, right of light and air, there is a course of decisions holding that, if possible, pecuniary compensation should be awarded instead of an injunction to remove the obstruction. But the only decree available under section 9 is a decree for recovery of possession, that is, the Court has no option but to grant an injunction. This difficulty does not arise in the case of a right of fishing. In the case of such an incorporeal right, possession, though given by means of an injunction, is, in practice, habitually awarded to a successful plaintiff (see remarks of Pigot, J., at bottom of p. 559 of I. L. R., 19 Calc.). Admitting, therefore, that a right of way is, speaking generally, immoveable property, I hold that it is not such within the terms of section 9 of the Specific Relief Act. Rule discharged with costs.

FULTON, J.:—I concur with my learned colleague in thinking that section 9 of the Specific Relief Act is not applicable to the removal of an obstruction to the enjoyment of a mere easement

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such as a right of way. It is unnecessary for the purpose of deciding this case to express any opinion as to its applicability where a person entitled to a right of fishery has been deprived of its use, for there seems to be little analogy between such a right, which can be enjoyed independently of other property, and an easement which is appurtenant to other property. The phraseology of Indian legislation and decisions has for a long time sanctioned the use of the words "possession" and "dispossession" in connection with incorporeal rights capable of independent enjoyment, and it may, therefore, fairly be argued that such rights come within the scope of section 9. But it seems to me that when a person is obstructed in his right of access to his property or in the enjoyment of light and air or of other amenity connected with that property, it would be an abuse of language to say that he was dispossessed of immoveable property. Such a right, which cannot be transferred apart from the dominant heritage, does not appear to come within the term "property" as used in section 9. It was argued that this right of way, which is described as an easement, was an interest in land, but, if so, it is an interest entirely dependent on the possession of the property to which it appertains, and cannot be possessed apart from it. It is a right appurtenant to property, but, taken by itself, does not seem to me to come within the term property which, under the section, must be property capable of separate enjoyment as an independent right. It has never, so far as I am aware, been held that the enjoyment of such a right can be enforced by a suit under section 15 of Act XIV of 1859 or under section 9 of the Specific Relief Act, and I agree with Mr. Justice Pigot's remarks in *Fadu Jhala* v. *Gour Mohun Jhala*[1], that the decision in *Haro Dyal Bose* v. *Kristo Gobind Sein*[2] is correct, and that the section is inapplicable to easements. In Gujarát, by the custom of the country, a right of privacy can be acquired by a house-owner, and if some one opened a window in his wall and thereby in violation of that right overlooked his neighbour's premises, it would hardly be argued that that neighbour had been dispossessed of property. But if the phrase be clearly inapplicable to a negative easement of this kind, it is difficult to see why it should be more applicable to a positive easement such

(1) (1892) 19 Cal. 544 at p. 559. (2) (1872) 17 Cal. W. R., 70.

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as a right of way. In the one case as in the other a right affecting another person's property exists, and the fact that section 9 cannot be used for the vindication of one kind of easement leads to the belief that it was not intended to apply to any easement. Had there been such intention, language more suited for the purpose would, I think, have been used.

I would discharge the rule with costs.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899. *March* 13.

BHIMBHAT GOTKHANDI (ORIGINAL DEFENDANT), APPELLANT, *v.* BHIKAMBHAT AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Pensions Act (XXIII of 1871), *Secs.* 6 *and* 11(1)—*Rule* (6)(2) *framed under the Act—Suit for recovery of varshâsan allowance—Collector's certificate —Cancellation of certificate by Revenue Commissioner.*

When a certificate is granted by the Collector under section 6 of the Pensions Act (XXIII of 1871), the presumption is, until the contrary is shown,

* Second Appeal, No 396 of 1898.

(1) Sections 6 and 14 of the Pensions Act (XXIII of 1871) :—

6. A Civil Court, otherwise competent to try the same (suits relating to pensions or grants), shall take cognizance of any such claim upon receiving a certificate from such Collector, Deputy Commissioner, or other officer authorized in that behalf that the case may be so tried, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly.

14. The Chief Controlling Revenue Authority may, with the consent of the Local Government, from time to time make rules consistent with this Act respecting all or any of the following matters :—(1) The place and times at which, and the person to whom, any pension shall be paid, (2) inquiries into the identity of claimants, (3) records to be kept on the subject of pensions, (4) transmission of such records, (5) correction of such records, (6) delivery of certificates to pensioners, (7) registers of such certificates, (8) reference to the Civil Court under section six, of persons claiming a right of succession to, or participation in, pensions or grants of money or land revenue payable by Government, and generally for the guidance of officers under this Act.

All such rules shall be published in the local official gazette, and shall thereupon have the force of law.

(2) Rule (6) framed under the Pensions Act :—

(6) Any claim preferred to a Collector under section 5 of the (Pensions) Act may be

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that the order for granting the certificate was made, as is contemplated by the 6th rule framed under the Act, with the previous sanction of the Revenue Commissioner by the Collector himself But the Revenue Commissioner has no power vested in him to cancel a certificate granted by the Collector, and there is no rule which provides for the revision by the Revenue Commissioner of the Collector's action in granting certificates or for the cancellation by him of the certificates granted by the latter.

SECOND appeal from the decision of L. Crump, Assistant Judge of Bijápur.

The two plaintiffs sued the defendant to recover a share in a certain *varshásan* allowance which the defendant received from Government. The first plaintiff obtained from the Collector and produced to the Court the certificate required by section 6 of the Pensions Act (XXIII of 1871).

The Subordinate Judge passed a decree in the following terms:—

"I, therefore, declare that plaintiffs Nos. 1 and 2 are each entitled to receive $\frac{1}{6}$th share in the cash allowance of Rs 57 by executing this decree from time to time."

The defendant appealed. Pending the appeal, the Revenue Commissioner cancelled the certificate which the Collector had granted to the first plaintiff. At the hearing of the appeal it was objected that the plaintiff, being now without the necessary certificate, could not maintain his claim. The District Judge confirmed the decision of the lower Court, and as to the certificate he said:—

"It is not disputed that plaintiff No. 1 obtained a certificate under section 6 of the Pensions Act. As far as he was concerned, the suit was properly entertained and the alleged cancellation or revocation of the same, after the decree had been passed, cannot oust the Court's jurisdiction. I am not aware of any provision of the law which allows a certificate to be cancelled or revoked. Plaintiff No. 2, however, never obtained any certificate at all, and the Court had no jurisdiction to try the case as far as she was concerned, but as plaintiff No 1 comes in as her

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referred by him for inquiry to any Assistant or Deputy Collector or other officer subordinate to him, and every Assistant or Deputy Collector in charge of tálukas may receive claims on behalf of the Collector and forward the same with his opinion, after inquiry, to the Collector; but every order for disposing of a claim or for granting a certificate under section 6, that a case against Government only or against Government and one or more private persons jointly may be tried, shall be made with the previous sanction of the Commissioner by the Collector himself.

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heir, and as the certificate authorizes him to sue defendant for a share of one-third in the *vatshasan* allowance, the defect if any, is cured."

The defendant preferred a second appeal.

Narayan G. Chandavarkar for the appellant (defendant).

Gokuldas K. Parekh for the respondents (plaintiffs).

PARSONS, C. J. (ACTING):—This suit was filed by the plaintiff with the certificate of the Collector as required by section 6 of the Pensions Act, 1871. The contention of the appellant (or defendant) is that this certificate has been cancelled by the Revenue Commissioner since the decree of the lower Court, so that it is no longer in force, and that this Court, therefore, cannot take cognizance of the claim. We might be able to give effect to this contention if it were shown that the Revenue Commissioner had any power vested in him to cancel the certificate of the Collector, but this is not done. Section 6 requires the certificate of the Collector only. Section 14 gives power to the Chief Controlling Revenue Authority, with the consent of the Local Government, to make rules respecting the reference to the Civil Court of claims, but no rule has been made which provides for the revision by the Revenue Commissioner of the Collector's action in granting certificates or for the cancellation by him of certificates granted by the latter. There is a rule (6) which requires that every order for granting a certificate under section 6 shall be made with the previous sanction of the Commissioner by the Collector himself. We must presume in this case that the certificate was originally granted with this sanction, since there is nothing on the record to show the contrary. This being so, no power has been given to the Revenue Commissioner to revoke the certificate given by the Collector, and we must treat the alleged revocation order as null and void.

On the merits, therefore, the decree must stand. A slight alteration is required in its language, since the defendant's liability only accrues when he has received the allowance from Government; this can be made by adding after the words "from time to time" the words "when the said amount is received." We amend the decree by the insertion of these words. The appellant must bear the costs of this appeal.

Decree amended.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

LADHAJI NATHAJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* HARI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1899. *March* 8.

Dekkhan Agriculturists' Relief Act (XVII of 1879), Sec. 11(1)—Civil Procedure Code (Act XIV of 1882), Sec. 57—Jurisdiction—Practice—Procedure when suit filed in wrong Court.

Under section 11 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), a suit in which there are several defendants who are agriculturists may be instituted and tried in a Court within the local limits of whose jurisdiction any one of such defendants resides and not elsewhere.

Where a suit was brought in the Court at Haveli, the plaintiffs alleging that some of the defendants who held lands within the jurisdiction of that Court were agriculturists, and the suit was dismissed because those defendants were found not to be agriculturists,

Held, that the proper procedure to be adopted in such a case was not to dismiss the suit, but to return the plaint for presentation to the proper Court.

SECOND appeal from W. H. Crowe, District Judge of Poona, confirming the decision of the Subordinate Judge of Haveli.

Plaintiffs sued to recover money alleged to be due on an account.

* Second Appeal, No. 538 of 1898.

(1) Section 11 of the Dekkhan Agriculturists' Relief Act (XVII of 1879):

Every suit of the description mentioned in section 3 clause (*w*), may, if the defendant, or, when there are several defendants, one only of such defendants is an agriculturist, be instituted and tried in a Court within the local limits of whose jurisdiction such defendant resides and not elsewhere.

Every such suit in which there are several defendants who are agriculturists may be instituted and tried in a Court within the local limits of whose jurisdiction any one of such defendants resides and not elsewhere.

Nothing herein contained shall affect sections 22 to 25 (both inclusive) of the Code of Civil Procedure.

3. The provisions of this Chapter (II) shall apply to—

(*w*) Suits for the recovery of money alleged to be due to the plaintiff—

on account of money lent or advanced to, or paid for, the defendant, or as the price of goods sold, or

an account stated between the plaintiff and defendant, or

on a written or unwritten engagement for the payment of money not hereinbefore provided for,

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They alleged that the fifth and sixth defendants were agriculturists holding lands within the jurisdiction of the Subordinate Judge's Court of Haveli, and they, therefore, having regard to sections 3 and 11 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), filed this suit in that Court. The Subordinate Judge of Haveli found that the fifth and sixth defendants were not agriculturists, and that the suit ought to have been brought in the Court of the Subordinate Judge of Sásvad, within the jurisdiction of which Court some of the other defendants who were agriculturists resided. He dismissed the suit, holding that he had no jurisdiction to hear it. He refused to return the plaint for presentation to the Court at Sásvad, holding that section 57 of the Civil Procedure Code (Act XIV of 1882) did not apply.

On appeal by the plaintiffs, the District Judge confirmed the decision, observing: —

"It has been contended that the Court should have returned the plaint, but the circumstances do not fall within the four corners of section 57 of the Civil Procedure Code, as option as to the selection of the Court is allowed by law as far as the grade of the Court is concerned."

The plaintiffs appealed to the High Court.

Mahadeo B. Chaubal for the appellants (plaintiffs):—The case was not heard on the merits. It was dismissed on a point of jurisdiction. A new suit would be barred by limitation We asked the Court to return the plaint in order that it might be presented at the Court at Sásvad which has jurisdiction, but our application was not granted. Section 57 of the Civil Procedure Code is applicable, and the plaint should have been returned—*Muthirulandi* v. *Koltayan* [1]; *Prabhakarbhat* v. *Vishwambhar Pandit* [2]; *Babaji* v. *Lakshmibai* [3].

Daji Abaji Khare for respondents (defendants):—Section 57 of the Code does not apply, and the lower Courts were right in refusing to return the plaint and in dismissing the suit.

PARSONS, C. J. (ACTING):—Under section 11 of the Dekkhan Agriculturists' Relief Act a suit in which there are several defendants who are agriculturists may be instituted and tried in a Court

(1) (1887) 10 Mad., 211. (2) (1884) 8 Bom., 313.
(3) (1884) 9 Bom., 266.

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within the local limits of whose jurisdiction any one of such defendants resides, and not elsewhere. Residence under the Act is defined in section 2, Explanation 3. In the present case the suit was brought in the Subordinate Court of Haveli on the allegation that defendants Nos. 5 and 6 were agriculturists and held lands within the jurisdiction of that Court. The Subordinate Judge found that defendants Nos. 5 and 6 were not agriculturists, and that the suit ought to have been brought in the Subordinate Court of Sásvad, within whose jurisdiction the other defendants, who were agriculturists, resided. He rejected the suit, but refused to return the plaint for presentation to the Sásvad Court, on the ground that the case did not fall within the provisions of section 57 of the Civil Procedure Code. The District Judge on appeal confirmed that order.

We think that the plaint ought to have been returned. It seems to us that the provisions of section 57 must be held to apply to the circumstances of the present case, because (*a*) no option as to the selection of the Court was allowed by law (which is the construction of the clause adopted by the Madras High Court in *Muttiralandi* v. *Kottayan*[1]; and (*b*) none of the defendants are dwelling within the local limits of the Haveli Court, for defendants Nos. 5 and 6 have their actual residence in the City of Poona. Even otherwise the fact remains that the Court in which the plaint had been presented had no jurisdiction to try the suit, and in every such case the proper procedure to be followed would be that laid down in *Khandu Moreshvar* v. *Shivji Gorhoji*[2], *viz.*, to return the plaint.

We, therefore, reverse the orders of the lower Courts and direct the Subordinate Judge to return the plaint to be presented to the proper Court with the endorsement required by section 57. The costs in the Court of first instance are to be borne by the plaintiff. Each party will bear his own costs in the other Courts.

Order reversed.

(1) (1887) 10 Mad., 211. (2) (1888) 5 Bom. H. C. Rep., 212.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Tyabji.

1899. March 8.

ISMAL AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* RAMJI SAMBHAJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mahomedan law—Gift—Gift if not perfected by possession is invalid—Delivery of possession—Possession—Registration.

Under the Mahomedan law a registered deed of gift is not valid if it is never perfected by possession.

The Mahomedan law requires that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession to the donee

Registration is not equivalent to possession

SECOND appeal from the decision of Ráo Bahádur Chunilal Maneklal, First Class Subordinate Judge, A. P., at Sátára.

Suit for redemption. The lands in dispute originally belonged to one Mahomed Mahabu.

On Mahomed's death, his widow Kulsum and his two daughters succeeded to the property.

In 1873 Kulsum alone mortgaged it to the father and grandfather of the defendants, and the mortgagees were put in possession. In 1883 she mortgaged it again to the father of the defendants.

In 1884 Kulsum and her two daughters made a gift of the property to one Jamat. The deed of gift was duly registered.

In 1886 Kulsum mortgaged the property again to the defendants.

On 28th July, 1892, Kulsum and her daughter sold the property to one Raju, and on the 16th August, 1892, they revoked the gift to Jamat by a notice in a local newspaper.

The plaintiffs were the brothers and heirs of Raju (the vendee), and they now sued the defendants to redeem lands from the above mortgages.

The defendants pleaded (*inter alia*) that the plaintiffs were not entitled to sue, having no interest in the property. They contended that the property having been given in 1884 to Jamat, Raju acquired nothing by his purchase in 1892.

* Second Appeal, No. 540 of 1898.

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ISMAL v. RAMJI.

The Court of first instance held that the gift to Jamat was valid under the Mahomedan law; that the donor had no authority to revoke the gift after the death of the donee; that the sale to Raju conveyed no title to him or his heirs; and that, therefore, plaintiffs had no right to redeem. The suit was, therefore, dismissed.

This decision was substantially confirmed on appeal by the First Class Subordinate Judge, A. P.

Against this decision plaintiffs preferred a second appeal to the High Court.

Macpherson (with him *B. A. Bhagvat*) for appellants.

Scott (with him *S. R. Bakhale*) for respondents.

The following authorities were referred to in argument — *Mohinudin* v. *Manchershaha*[1]; *Shaik Ibrahim* v. *Shaik Suleman*[2]; *Meherali* v. *Tajudin*[3]; *Kali Das Mullik* v. *Kanhya Lal*[4]; *Mahomed Bulsh Khan* v. *Hossaini Bibi*[5].

CANDY, J.:—The only question argued before us in this appeal was as to the validity of the deed of gift (Exhibit 53) executed by Kulsum and her daughters in favour of Jamat. It is admitted that the donors were not in possession of the property at the time of the execution of the deed of gift. The property had already been mortgaged by Kulsum alone in 1873 by the mortgage-deed (Exhibit 32). It was further mortgaged by Kulsum in 1883. At the time of the execution of the deed of gift in 1884 the mortgagees were in possession under their deeds as usufructuary mortgagees. Kulsum not being herself in possession could of course deliver no possession to the donee, and it is not alleged that any such possession was or could have been given. It is the fact, however, that, after the execution of the deed, she applied to the revenue authorities to transfer the property into the name of the donee, but this was refused by the order (Exhibit 12) on the ground that no transfer could be made in her lifetime.

In favour of the validity of the gift it was argued that, inasmuch as this was all that Kulsum could do to give possession to

(1) (1882) 6 Bom., 650.
(2) (1884) 9 Bom., 146.
(3) (1888) 13 Bom., 159.
(4) (1884) 11 I. A., 218.
(5) (1888) 15 I. A., 81.

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the donee, the requirements of the Mahomedan law have been complied with. This argument was accepted by both the lower Courts, which have accordingly held the gift to be valid. We are, however, of opinion that the contention is unfounded. The Mahomedan law requires that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession of this property to the donee —see *Mohinudin* v. *Manchershah*[1]; *Shaik Ibrahim* v. *Shaik Suleman*[2]; *Micherali* v. *Tajudin*[3].

On behalf of the respondents, however, reliance was placed upon *Kali Das Mullick* v. *Kanhya Lal Pandit*[4]. This was, however, a case of Hindu law, and as such has no direct application to the case of gift by a Mussalman donor as was pointed out by the Court in *Meher Ali* v. *Tajudin* above referred to. Moreover, the donor in that case, so far from repudiating the gift, actually supported it. It is true that this case was referred to in *Mahomed Buksh Khan* v. *Hosseini Bibi*[5], which was a case between Mussalmans. In this last case, however, their Lordships of the Privy Council held the gift to be valid on the ground that it had been perfected by possession having subsequently been actually taken by the donee. In the present case, however, not only was no possession ever given to the donee, but the gift was practically revoked in 1886 by Kulsum having executed a third mortgage (Exhibit 34) and was afterwards expressly revoked on 16th August, 1892.

Under these circumstances we hold that the deed of gift is not valid, as it was never perfected by possession, and that the inchoate or ineffectual gift was validly revoked by the donor. It is of course clear that registration is not equivalent to possession (*vide Mogulsha* v. *Mahamad Saheb*[6]).

We, therefore, reverse the decree of the appellate Court, and remand the case to be disposed of on the fourth and fifth issues. Plaintiffs to have the cost of this appeal. The costs in the lower Courts already incurred and to be incurred to be disposed of by the lower appellate Court.

Decree reversed.

(1) (1882) 6 Bom., 650 (F. B.)
(2) (1884) 9 Bom., 246.
(3) (1888) 13 Bom., 159.
(4) (1881) 11 I. A., 218.
(5) (1888) 15 I. A., pp. 81—85.
(6) (1887) 11 Bom., 217.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

1899
April 8.

IN THE MATTER OF THE NEW GREAT EASTERN SPINNING AND WEAVING COMPANY, LIMITED.

RAMDAS KESSOWJI, APPLICANT

Company—Transfer of shares—Approval of transfer by directors—Such power of approval a fiduciary power—Resolution of directors to approve of future transfers ultra vires.

By the articles of association of the New Great Eastern Spinning and Weaving Company transfers of shares in the company were subject to the approval of the directors. On the 18th October, 1893, the directors passed a resolution "that up to the time of the next ordinary general meeting the Board approve of all transfers of shares made by Dwarkadas Shamji and Ramdas Kessowji (two of the shareholders), or either of them, and . . . . . will transfer shares standing in the name of Dwarkadas Shamji and in the name of Ramdas Kessowji to their or his transferees without claiming any lien or raising any objection."

Held, that the above resolution was *ultra vires* and not binding on the company. The power conferred on the directors by the articles of association was a fiduciary power to be exercised for the benefit of the company, and could not be exercised until the question of each transfer, together with the names of the transferor and the transferee, was before them and they had an opportunity of considering each case.

IN chambers. Summons obtained by Ramdas Kessowji on the 23rd December, 1898, calling on the New Great Eastern Spinning and Weaving Company, the directors, and secretaries and agents thereof to show cause "why the register of the said company should not be rectified by entering therein the fact that the respective registered holders of the shares, the numbers whereof are stated in a list annexed to the applicant's affidavit, have ceased to be members of the said company in respect of the said shares, and by substituting in the said register as holders of the said shares the names of the respective transferees thereof as stated in the said list, and why the said company and its directors, and secretaries and agents or some or one of them should not pay the costs of the application, and such damages as the said Ramdas Kessowji and Dwarkadas Shamji or the registered holders of the said shares may have sustained by reason of the delay in rectification of the said register."

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One of the articles of association was as follows:— been lower

"22. The Board may decline to register any transfer of shares w as We e- holder executing the same is either alone or jointly with any other person indebted to the company on any account whatsoever or unless the transferee is approved by the Board, who are in every case to have the right of pre-emption at the market rate of the day, and the registration of a transfer shall be conclusive evidence of the approval by the directors of the transferee."

The applicant Ramdas Kessowji and one Dwarkadas Shamji were shareholders and directors of the above company and were also partners in the firm of Vanmalidas J. Shamji & Co., the said firm being the secretaries and treasurers and agents of the company.

On the 30th June, 1898, Ramdas and Dwarkadas agreed to sell certain shares in the company to Jugmohundas Vaijivandas and Fakirchand Premchand and to retire from the agency.

Disputes arose between the vendors and purchasers of the shares with regard to the purchase, as the agent's account for 1897 had not yet been passed by the board, and the company, under the articles of association, had a lien upon shares in respect of which there was any liability and the directors had power to refuse to register transfers.

On the 18th October, 1898, there was a meeting at the office of the company, at which the directors, (including the vendors), the secretaries, treasurers and agents and the purchasers were present, and the disputes were settled; two of the terms of the settlement being that the vendors consented to receive Rs. 25,000 less for the shares than the sum originally agreed upon, and that the directors of the company should accept and pass, up to a certain date, all transfers of shares executed by the vendors or their nominees. Subsequently on the same day a meeting of the directors was held, at which the two vendors resigned their position as directors, and the two purchasers were thereupon elected directors in their place. Immediately afterwards the newly constituted board of directors passed the following resolution:—

"That up to the time of the next ordinary general meeting, the board approve of all transfers from Messrs. Dwarkadas Shamji and Ramdas Kessowji, or either of them and their or his mortgagees or nominees, and the company will transfer shares standing in the name of Dwarkadas Shamji or his nominees or mortgagees

and shares standing in the name of Ramdas Kessowji and his nominees or mortgagees to their or his transferees without claiming any lien or without raising any objection, and this resolution be communicated to the said Dwarkadas Shamji and Ramdas Kessowji."

This resolution was formally communicated to Ramdas and Dwarkadas, who subsequently sold a large number of shares and tendered the certificates and transfer paper, &c., at the office of the company in order that the shares might be duly transferred. The applicants, however, refused to leave the papers at the office unless they were given a "clean receipt" for them, *i.e.*, a receipt not containing the usual words "subject to the sanction of the directors." The clerk refused to give such a receipt, and the shares were, therefore, not transferred.

On the 17th December, 1898, the directors rescinded the above resolution of the 18th October, and caused information of the rescission to be given to Ramdas and Dwarkadas. On the 23rd December, 1898, the above summons was taken out against the company by Ramdas Kessowji.

Two points were raised in the affidavits filed in opposition to the summons, *viz.*:

(1) That at the meeting of the 18th October, at which the above resolution was passed, there was not a quorum of directors present, inasmuch as the newly appointed directors Jugmohundas Varjivandas and Fakirchand Premchand were not qualified, the shares which they had purchased not having then been transferred to their names in the company's register.

(2) That in any event the resolution was *ultra vires*.

At the hearing the Judge decided that the first question could not be decided on affidavit, and that, if necessary, oral evidence should be given. The second question only was, therefore, argued.

Macpherson and *Scott* in support of the rule. They cited sections 83 and 92 of the Companies Act (VI of 1882); *Barber's case* [1]; *Jenner's case* [2]; *In re Portuguese Consolidated Copper Mines* [3];

(1) (1877) 5 Ch. D., 963. (2) (1877) 7 Ch. D., 132.

(3) (1891) 3 Ch., 28.

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Murray v. *Bush*[1]; *In re Cawley & Co.*[2]; *Mothoor Mohun* v. *Bank of Bengal*[3]; *In re Stockton Malleable Iron Co.*[4]; *Gilbert's case*[5], *Weston's case*[6]; *In re Bell Brothers*[7]; *In re Ceylon Land and Produce Company*[8]; *Reg.* v. *Inns of Court Hotel Company*[9].

Lowndes (for the company), *Raikes* (for the directors) and *Kirkpatrick* (for the secretaries and agents) *contra*. They cited section 58 of the Indian Companies Act (VI of 1882); *Dawson* v. *African Consolidated Land Trading Company*; *In the matter of the petition of Luchmee Chund*[11]; *Kaikhosro Heeramaneck* v. *Coorla Spinning and Weaving Company*[12]; *Bennett's case*[13]; *In re Coalport China Company*[14]; *Head* v. *Gould*[15].

STARLING, J.:—Ramdas Kessowji and Dwarkadas Shamji, whom I shall call the applicants, although the former is the only applicant in the matter, were directors of the New Great Eastern Spinning and Weaving Company, Limited, and also partners in the firm which carried on the duties of secretaries, treasurers and agents of the company. They were and are also shareholders in the company. On the 30th June, 1898, for certain considerations, they agreed to sell their interest in the agents' firm and 400 shares in the company to Jugmohundas Varjivandas and Fakirchand Premchand. Subsequently certain disputes arose, which, on the 18th October, 1898, were settled, and two of the terms of settlement were that the purchasers were to have a reduction of Rs. 25,000 in the price paid by them, and the directors of the company were to accept and pass up to a certain date without any question all transfers of shares executed by the applicants or their nominees, the directors having under article 22 of the articles of association power to refuse to register transfers.

On the last mentioned day there was a long and continuous meeting, lasting from 3 to 8 P.M., at which the settlement men-

(1) (1872) L. R., 6 H. L., 37 at p. 69.
(2) (1882) 42 Ch. D., 209.
(3) (1878) 3 Cal., 392
(4) (1875) 2 Ch. D., 101.
(5) (1870) L. R., 5 Ch., 559 at p. 565.
(6) (1868) L. R., 4 Ch., 20.
(7) (1891) 65 L. T. (N. S.), 245.
(8) (1891) 7 Times Law Rep., 692.
(9) (1863) 11 W. R., 806.
(10) (1898) 1 Ch., 6.
(11) (1882) 8 Cal., 317.
(12) (1891) 16 om., 80.
(13) (1854) 5 De G. M. & G., 281.
(14) (1895) 2 Ch., 404.
(15) (1898) 2 Ch., 250.

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tioned above was come to, at which the directors, secretaries, treasurers and agents and the purchasers were present. About 6 P.M., the directorial members of the meeting became a meeting of the directors of the company, and the two applicants resigned their position as directors. Thereupon the two purchasers were elected directors in their place, and immediately afterwards the newly constituted board of directors passed a resolution that, up to the then next ordinary general meeting of the company, the board would approve of all transfers of shares by the applicants and their nominees, and transfer the same to their transferees without claiming any lien on them, or raising any objection to the transferees. At that time, it is alleged by the respondents to this application that the purchasers were not qualified to act as directors, because they were not possessed of the requisite number of shares. I decided that in the present case that question could not be conveniently tried on affidavit, but that, if necessary, the parties could adduce evidence on the point, and, so far as any assumption was necessary, it was assumed in argument that they had not qualified by getting the requisite number of shares transferred into their names.

Subsequently to the 18th October, a number of share certificates and transfers were tendered by the applicants in order that the shares might be transferred to the names of the transferees; but the company refused under the circumstances to receive them, it being admitted by Mr. Macpherson that these were not left at the company's office even for examination, and it is apparent from the affidavits and correspondence that they would not have been so left unless a clean receipt had been given for them, *i. e.* one not containing any reservation "subject to the sanction of the directors" or words to that effect.

On the 17th December, 1898, the directors rescinded their resolution of the 18th October and communicated such rescission to the applicants. On the 23rd December the applicants took out the present summons, calling upon the company, the directors and the secretaries, treasurers and agents to show cause why the register of shareholders should not be rectified by removing the names of the applicants from the registrer of shareholders and inserting the names of their transferees.

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The points argued before me were: (1) was the board (assuming that two of the directors had not the qualifying number of shares) competent to pass any resolution binding on the company on the 18th October; (2) supposing it was so competent, was the resolution passed *ultra vires*: (3) did the applicants take such steps as were necessary to entitle them to an order of this Court directing the company to rectify the register?

I will discuss the second point first. Counsel for the respondents argued that the resolution was *ultra vires* on the ground that the directors could not by a general resolution hinder themselves from carrying out the trust imposed upon them by article 22 of the articles of association of the company to consider the circumstances of each separate transfer in order that no improper or undesirable person might be admitted as a member of the company and that the lien of the company on the shares of its debtors might be preserved. In *In re Coalport China Company* (1) Rigby, L. J., describes such a power as "a fiduciary power; it is to be exercised for the benefit of the company and with due regard to the interests of the transferee," consequently it cannot be exercised until the transfer with the names of the transferor and the transferee are before them and they have had an opportunity of considering each case.

That being so, can the directors, by a resolution, bind themselves or the company not to exercise that fiduciary power? *Bennett's Case* (2) was on all fours with the present, except that there the resolution passed was in consideration of a large sum of money being paid to and for the benefit of the company; while here it was in consideration of the remission of a large sum of money to two of the directors in their personal capacity, which makes the case much stronger against the present applicant. In that case Knight Bruce, L. J., at p. 395 said: "How could it have been consistent with the true meaning of the deed regulating the administration of the affairs of the company, or with the duty of the directors, to sell their right of objecting to a person proposed to become a new shareholder by a transfer from an existing shareholder, even though the money to be thus obtained was not to be corruptly applied. * * * The arrangement

(1) (1895) 2 Ch. 401 at page 410. (2) (1854) 5 De G. M. and G., 284.

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was a combination to defeat one material and important provision of the deed and was, therefore, in effect a fraud upon the Company.' Turner, L.J., at p. 300 also says: "The powers given by this deed to the directors to give or withhold their consent to transfers have been wrested to the purpose of enabling the directors to carry out an arrangement contrived and disguised for effecting the retirement of a large body of shareholders, . . . I am of opinion that such a use of these powers was not warranted." I have no doubt that the learned Judges who decided that case would have come to the same conclusion in the present case, and I must, therefore, hold that the resolution of the 18th October was *ultra vires* and is not binding on the company, and consequently the applicant is not entitled to have the transfers presented by him registered without the directors being permitted to consider each separate transfer. As I have decided against the validity of the resolution, even if passed by a properly constituted board, I need not consider the first point argued before me.

As to the third point, it is clear from the affidavits that, up to the time this summons was issued, the applicants had not furnished the names even of the transferees to the directors, though they did on the 18th December furnish the names of the transferors (nominees of the applicants) and they would not at any time up to the present have lodged the share certificates and transfers unless a clean receipt had been given for them; consequently they have not put themselves in a position to ask this Court to order a rectification of the register in the manner asked for by them. When proper applications are made to the directors and they have had an opportunity of considering each of them, they may pass them all, or reject all, or pass some and reject the others, and the applicants will then be at liberty to act as they may be advised, but until the directors have had an opportunity of considering each transfer there was no right in the applicants to take out this summons, which I accordingly dismiss.

The applicants must pay the costs of the company, but as I consider the dealings between the applicants and the purchasers as anything but creditable to either party and a fraud upon the

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company, all the other parties must bear their own costs. Counsel certified for.

Summons dismissed.

Attorneys for the applicants :—Messrs. *Thakurdas, Dharamsi, Cama and Hormasji.*

Attorneys for the opponents :—Messrs. *Ardesir, Hormasji and Dinsha.*

ORIGINAL CIVIL.

Before Sir L. Jenkins, Kt., Chief Justice, and Mr. Justice Tyabji.

1899. *June* 16.

HURGOVINDAS PRANJIVANDAS AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* JADAVAHOO AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Practice—Appeal by defendants—Objections to decree filed by plaintiff—Subsequent withdrawal of appeal—Application by plaintiff for leave to appeal—Sufficient cause—Limitation Act (XV of 1877), Sec. 5—Civil Procedure Code (Act XIV of 1882), Sec. 561.

The appellants (defendants) filed an appeal against the decree passed in this case on the 30th August, 1898, and on the same day gave notice thereof to the respondents (plaintiffs), who on the 28th September, 1898, filed cross-objections to the decree under section 561 of the Civil Procedure Code (Act XIV of 1882). On the 2nd March, 1899, the appellants gave notice to the respondents that they would not proceed with the appeal. The respondents then applied to be allowed to appeal, alleging that they had from the first intended to appeal, but had not done so only because the other side had filed an appeal. That being so, they had merely filed cross-objections

Held, that the application should be granted. It appeared that the applicants had intended to appeal, and would have appealed, but for the fact that an appeal in the suit was already on the file Under these circumstances the applicants showed "sufficient cause" for not filing their appeal within section 5 of the Limitation Act (XV of 1877), and were, therefore, not barred by limitation.

RULE obtained by respondents (plaintiffs) calling on appellants (defendants) to show cause why they (the respondents) should not have leave to appeal.

The case was heard by a Division Court (Candy, J.), and a decree was passed on the 30th August, 1898. On the 7th September, 1898, defendants appealed, and on the same day gave notice of the fact to the plaintiffs, who thereupon on the 28th Septem-

* Suit, No. 652 of 1897.

ber, 1898, filed cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

On the 2nd March, 1899, the appellants' solicitor by letter informed the respondents' solicitor that the appeal would not be proceeded with and that the appellants would allow it to be dismissed with costs. The respondents' solicitor replied to the notice by the following letter, dated 3rd March, 1899 :—

"With reference to your letter of yesterday, I have to state that the respondents object to appeal filed by your clients being now dismissed, as my clients have filed their objections to the whole of the decree. The respondents will, therefore, proceed with the hearing of the appeal and their objections if the appellants decline to proceed with their appeal. My clients will insist upon your furnishing them three copies of the printed paper books of appeal at once and, in the meantime, if the appeal appears on the board for hearing, the same will have to be postponed until the said copy paper books are furnished by you to me."

On the 17th March, 1899, the appeal being on the board was called on for dismissal, when counsel for the respondents applied for and obtained a rule *nisi* calling on the appellants to show cause 'why the respondents should not be allowed to appeal against the decree on the grounds set forth in their objections to the decree."

The question of the dismissal of the appeal was ordered to stand over till the hearing of the rule.

The rule now came on for hearing. The respondents' solicitor filed an affidavit in which he stated that his clients were dissatisfied with the decree of the 30th August, 1898, and had instructed him to file an appeal against it; that on the 31st August, 1898, he applied to the Prothonotary for a copy of the judgment, which he obtained on the 5th September; that on that day (5th September), he consulted counsel as to the appeal and was about to prepare instructions for counsel to draw the memorandum of appeal, when on the 7th September, 1898, he received a letter from the appellants' solicitor stating that the appellants had filed an appeal, and that as such appeal was filed, the respondents were advised to file objections to the decree instead of appealing, which they did on the 28th September, 1898.

The last paragraph of the affidavit was as follows :—

"I say that the respondents (plaintiffs) were prepared to file an appeal before the 19th day of September, 1898, and would have filed the same against the said

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decree within the prescribed time if the said appellants (defendants) had not filed their said appeal first. The plaintiffs-respondents, therefore, pray that they may be allowed to proceed with their objections or to file a fresh appeal against the aforesaid decree."

Starling in support of the rule.

Scott (Acting Advocate General) *contra*.

The following authorities were cited:—*Gour Hari Sanyal* v. *Prem Nath*(1); *Chudasama Manabhai* v. *Mahant Ishwargar*(2); *Jafar Husain* v. *Ranjit Singh*(3); *Surbhai* v. *Raghunathji*(4); *Jaita* v. *Balu*(5); *Ramjiwan* v. *Chandmal*(6); *In re Manchester Economic Building Society*(7).

JENKINS, C. J.:—In this case a rule has been obtained by the respondents (plaintiffs) calling on the appellants to show cause "why the said respondents should not be allowed to file a memorandum of appeal to the decree herein on the grounds set out in their objections to the said decree."

The facts which have given rise to this application for leave to appeal are these. A decree was passed in this suit with which the plaintiffs (respondents) were dissatisfied, and against which they determined and were prepared to appeal. Their appeal, however, was not presented, because the defendants filed an appeal against the same decree. Instead, therefore, of appealing, the respondents proceeded under section 561 of the Civil Procedure Code (Act XIV of 1882) and filed cross-objections to the decree. No question is raised as to these objections. They were duly filed under the provisions of the section. The appellants have now, however, decided not to proceed with their appeal, and have informed the respondents of the fact. The appeal being thus abandoned, the respondents cannot proceed with their objections to the decree, and they, consequently, apply for leave to file an appeal against the decree. The appellants oppose the application on the ground that the time allowed for appeal by the Limitation Act (XV of 1877) has expired. The respondents on the other hand contend that the case comes within section 5 of that Act, and

(1) (1883) 9 Cal., 738.
(2) (1891) 16 Bom., 249 at pp. 253-4.
(3) (1895) 17 All., 518.
(4) (1873) 10 Bom. H. C. Rep., 397.
(5) (1866) 3 Bom. H. C. Rep., 181 (A. C. J.)
(6) (1888) 10 All., 587.
(7) (1883) 24 Ch. D., 488.

that, under the circumstances, the Court should hold that they had "sufficient cause for not presenting the appeal within the prescribed time.

It has been argued that in a series of cases, both in this Court and in the Allahabad High Court, it has been decided that the mere fact that an appeal has been withdrawn, does not amount to sufficient cause within section 5 of the Act. I do not think that it was intended in these cases to lay down any general rule to be applied to every case. Each case must be decided upon its own special circumstances. None of the cases cited were on all points similar to this one. From the affidavit filed by the attorney for the respondents, it appears that they had fully intended to appeal and would have appealed if the other party had not already filed their memorandum of appeal. Having regard to the facts of this case, I think, the rule should be made absolute and that we should give leave to appeal.

TYABJI, J.:—I agree. The only question is whether the facts amount to sufficient cause within section 5 of the Limitation Act (XV of 1877). We have been pressed with the cases in which it has been held that mere withdrawal of an appeal is not *per se* sufficient cause. In deciding this case, I do not differ from these decisions. The question is, do the facts here show something more? I think they do. I am satisfied that the respondents intended to appeal. One reason for their not having done so was that the other side appealed. I think, under these circumstances, they were justified in not filing a separate appeal. To hold that they were bound to do so would be unnecessarily to add to the costs of litigation. When one appeal would be sufficient, why should two or three or perhaps more appeals be filed in one suit, merely to be held in reserve in case the first should be withdrawn? I think that if a party can show that he intended to appeal and would have appealed, only that one appeal in the suit was already on the file, the Court ought to be satisfied that there has been "sufficient cause" within section 5 of the Limitation Act.

Rule absolute.

Attorneys for appellants:—Messrs. *Ardesir, Hormasji and Dinsha.*

Attorney for respondents:—Mr. *Shamrao Pandurang.*

CRIMINAL REFERENCE.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899. *March* 9.

QUEEN-EMPRESS *v* JEYRAM HARIBHAI.*

Criminal Procedure Code (Act V of 1898), *Secs.* 269, *Cl.* 3, *and* 307—*Jury—Trial by jury of an offence triable with the aid of assessors—Practice.*

The accused was tried by a jury on four charges (1) forgery, (2) using a forged document, (3) criminal misappropriation, and (4) attempting to use a forged document as genuine. The jury returned a unanimous verdict of "not guilty" on all the charges. The Sessions Judge agreed with the jury in their verdict on the 1st, 2nd and 4th charges, but he differed from them on the 3rd charge, which was criminal misappropriation. This offence was not triable by a jury and ought, therefore, under clause 3 of section 269 of the Criminal Procedure Code (Act V of 1898), to have been tried by the Sessions Judge with the aid of the jurors as assessors. Nevertheless the Judge took the verdict of the jury upon this charge, and differing from it, referred the case to the High Court under section 307 of the Code.

Held, that although the procedure of the Sessions Judge was irregular, the trial by jury must be accepted as legal, and the case as one that could be referred to the High Court under section 307 of the Criminal Procedure Code.

REFERENCE by E. H. Moscardi, Sessions Judge of Surat, under section 307 of the Criminal Procedure Code (Act V of 1898).

The accused was tried by a jury on four charges: (1) forgery of a valuable security under section 467 of the Indian Penal Code, (2) using as genuine a forged document under section 471, (3) criminal misappropriation of property under section 403, and (4) attempting to use as genuine a forged document under sections 511 and 471 of the Code.

The jury returned a unanimous verdict of not guilty on all the charges.

The Sessions Judge concurred with the verdict of the jury on the 1st, 2nd and 4th heads of the charge, but differing from their verdict on the 3rd charge, referred the case to the High Court under section 307 of the Code of Criminal Procedure (Act V of 1898).

Ráo Bahádur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

* Criminal Reference, No. 4 of 1899.

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Ramdutt V. Desai for the accused.

PARSONS, (ACTING) C. J.—The Sessions Judge in this case agreed with the jury in their verdict on the 1st, 2nd and 4th charges, but he differed from them on the 3rd charge, which was criminal misappropriation, an offence punishable under section 403 of the Indian Penal Code. This latter offence was not triable by jury and, therefore, under sub-section 3 of section 269, Criminal Procedure Code, should have been tried by the Court of Session with the aid of the jurors as assessors. Nevertheless the Sessions Judge took the verdict of the jury upon it, and differing from it has submitted the case under section 307 of the Criminal Procedure Code. The procedure of the Sessions Judge was clearly most irregular, but it appears on the authorities that we must accept the trial by jury as a legal one, and hold the case to be one that can be submitted under section 307. This was the decision of the Calcutta High Court in *In the matter of Bhootnath Dey*[1] and *Surja Kurmi* v. *Queen-Empress*[2]. It was also the decision of this Court in *Imp.* v. *Dev Vithu*[3], where the verdict of the jury of not guilty of an offence triable with the aid of assessors was treated as valid, and the Court heard and disposed of the case under section 307. Our decision in *Imp.* v. *Lalbu*[4], as to the right of appeal in a case so tried, in no way conflicts with these decisions.

On the merits, the guilt of the accused is clearly proved. He found this Government promissory note, kept it with him for two years without trying to discover the owner, and then attempted to obtain the principal and interest due upon it. No doubt witnesses Nos. 20 and 22 were also in the plot, but that fact does not exonerate the accused. We convict the accused of the offence of misappropriation charged punishable under section 403 of the Indian Penal Code and sentence him to six months' rigorous imprisonment and a fine of Rs. 50, in default of payment to fifty days' additional rigorous imprisonment.

(1) (1879) 4 C. L R., 405.
(2) (1898) 25 Cal., 555.
(3) Cr. Rul. No. 19 of 1892.
(4) Cr. Rul. No. 15 of 1898.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899 *March* 13

GANESH VITHAL JADE (APPLICANT), APPELLANT, *v.* KUSABAI (OPPONENT), RESPONDENT.*

Guardian and Wards Act (VIII of 1890), Secs 13, 46 *and* 39—*Duty of District Court to hear all evidence—Decision based on evidence taken by a Subordinate Court illegal—Practice—Minor—Guardian.*

Section 46 of the Guardian and Wards Act (VIII of 1890) does not control section 13 of the Act, so as to authorize the District Judge to dispense with the hearing of evidence by himself and transfer the whole investigation of material issues of fact to a Subordinate Court. Nor does it empower the District Judge to use the evidence taken by the Subordinate Court.

An application was made for the appointment of a guardian to the person and property of a minor. The District Court sent the application to a Subordinate Judge for inquiry and report, and issued a notice calling upon any who objected to the appointment of the proposed guardian to appear before the Subordinate Judge, who would hear and dispose of the objections. The whole inquiry was held before, and all the evidence was taken by, the Subordinate Judge. Upon the evidence so taken, the District Judge disposed of the application.

Held, that the procedure adopted by the District Judge was illegal, and his decision based upon evidence not taken before him could not be accepted.

APPLICATION under the Guardian and Wards Act (VIII of 1890) for the appointment of a guardian to the person and property of a minor.

The applicant alleged that one Sadashiv Narayen Jade died possessed of considerable moveable and immoveable property; that a few hours before his death he adopted the minor Balkrishna, who performed his funeral ceremonies and inherited the whole of his estate; that the minor lived with his adoptive mother Kusabai for a time; that disputes then arose between Kusabai and the minor's natural father, in consequence of which Kusabai turned the minor out of the house, neglected his education, and wasted his property.

The applicant, therefore, prayed that the Nâzir of the District Court should be appointed as guardian of the minor's person

* Appeal, No 102 of 1898.

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and property. This application was presented to the District Judge of Poona on 11th November, 1896.

On 13th November, 1896, the District Judge sent the application to the Joint Subordinate Judge of Poona for inquiry and report as to whether the allegations made in the application were true, and whether it was necessary to appoint a guardian.

At the same time the District Judge issued a notice calling upon any person who objected to the appointment of a guardian to appear on the 14th December, 1896, before the Joint Subordinate Judge.

In answer to this notice, Kusabai appeared before the Subordinate Judge and objected to the appointment of a guardian on several grounds. She urged (*inter alia*) that the minor was adopted by her after her husband's death under an agreement made with his natural father, which provided that the minor should live with her till he came of age, when, if they disagreed, the whole of her husband's property should be divided half and half between herself and her adopted son.

The Subordinate Judge, without going into the question of the agreement set up by Kusabai, limited the inquiry before him to the question whether it was in the interest of the minor to appoint a guardian of his person or property or both.

On this question the whole of the evidence was recorded by the Subordinate Judge, and a report was submitted by him to the District Judge on the 8th March, 1898, recommending that a guardian should be appointed to the person and property of the minor.

On the 9th June, 1898, the District Judge sent back the case to the Subordinate Judge for further inquiry as to the truth of the conditional adoption alleged by the opponent Kusabai.

The Subordinate Judge took evidence on this question, and sent it to the District Judge, without making any report, or expressing his opinion on the evidence recorded, as the order of the 9th June, 1898, was silent on that point.

On the evidence taken by the Subordinate Judge, the District Judge finally disposed of the application on the 18th November,

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1898. He held that the conditional adoption as alleged by the opponent Kusabai was proved, and that there was no ground for removing her from the guardianship. The application was, therefore, rejected.

Against this order the applicant appealed to the High Court.

Ganpat Sadashiv Rao for applicant:—The procedure in this case was irregular and illegal. The District Judge instead of taking the evidence himself, transferred the whole inquiry to a Subordinate Court and based his decision upon evidence recorded by that Court. Section 13 of Act VIII of 1890 expressly requires the District Judge to hear all the evidence. He cannot delegate this duty to a Subordinate Court.

Under section 46 [1] he may call for a report from a Subordinate Court on any matter relevant to the inquiry before him; but he cannot rest his decision on evidence taken by the Subordinate Court. Here the judgment is founded entirely on evidence recorded by the Subordinate Judge. Moreover, on the merits the decision cannot stand. The opponent admits that she is unable to manage the minor's property, and she sets up an agreement with the minor's natural father under which she claims a moiety of the property left by the minor's adoptive father. Her interests are thus distinctly adverse to those of the minor. And the Judge ought to have removed her from the position of guardian under section 39 (*g*) of the Act.

N. G. Chandavarkar for respondent:—The objection taken here to the lower Court's procedure was never raised in the Court below. The case was pending in the District Court for nearly two years, during which time the appellant never objected to the inquiry being held by the Subordinate Judge. On the contrary he adduced all the evidence he had before the Subordinate Judge without any demur or objection. Nor did he object when the District Judge finally heard the arguments of both parties on the evidence taken by the Subordinate Judge. It is only now, after the case has been decided against him, that he

[1] Section 46 of Act VIII of 1890 provides as follows:—"(1) The Court may call upon the Collector, or upon any Court subordinate to the Court, for a report of any matter arising in any proceeding under this Act and treat the report as evidence."

raises this technical objection. It is the general practice for the District Court to send such cases for inquiry and report to a Subordinate Court. And if he acts on such report, or bases his decision on evidence taken during the course of such inquiry, I submit he does not act illegally. On the merits, the District Judge finds that there is no sufficient reason for removing the minor from the guardianship of his adoptive mother. It is in the interests of the minor that a stranger should not be appointed as his guardian.

PARSONS, J.:—The procedure in the lower Court has been distinctly illegal. Section 11 of the Guardian and Wards Act, 1890, requires the Court, that is, the District Court, to fix a day for the hearing of the application, and section 13 provides that "on the day fixed for the hearing, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application." In the present case the District Judge neither gave notice of a hearing before himself, nor took any evidence himself. On receipt of the application he sent it to the Joint Subordinate Judge for investigation as to whether the allegations made in it were proper, whether it was necessary that a guardian should be appointed, and whether the minor was attending any, and if so, what school, and he issued a notice calling on any who objected to the appointment of the proposed guardian to appear on the 11th December, 1896, before the Joint Subordinate Judge, who would hear and dispose of the objections. The whole enquiry was held before, and all the evidence was taken by, Subordinate Judges. Section 46 of the Act permits the District Court to call "upon any Court subordinate to itself for a report on any matter arising in any proceeding under this Act, and treat the report as evidence." This clearly does not mean that the whole enquiry should be handed over to a Subordinate Judge, and it does not allow of the use by the District Court of evidence taken by the Subordinate Court. I think that the irregularity is one that vitiates the whole proceedings, and that the conclusion that the District Judge has come to upon evidence not taken before him, cannot be accepted. The parties have the right to require that the District Judge shall take their evidence and pronounce judgment upon it.

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We reverse the order and remand the application for a legal hearing.

Costs to abide the result.

RANADE, J.—In this case, the appellant, who is a relative of the minor Balkrishna, made an application under sections 10—12 of Act VIII of 1890, praying that a guardian be appointed to the person and property of the minor, as the opponent, the minor's adoptive mother, had turned the minor out of the house, and was wasting his property. In the first application made on 11th November, 1896, the applicant prayed that the Názir of the District Court might be appointed as guardian. In a supplementary application, made on 14th December, 1896, the name of one Govindrao Shete was suggested in place of the Názir. The original petition was sent on 13th November to the Joint Subordinate Judge of Poona, who was asked to report if the allegations made in the petition were true, and also whether it was necessary to make an appointment as prayed for, and whether the minor attended school. The opponent in her reply denied that she had turned out the minor from her house or that she was squandering the property. She further stated that under an agreement made with the minor's father at the time of adoption, she and the minor had equal claim to the property. The Joint Subordinate Judge before whom the inquiry was held, asked the District Judge on 6th July, 1897, whether he should include in his inquiry the disputed question of the adoption and the agreement set up by the opponent, and the District Judge informed him that he should only report on two points: (1) whether it was in the interest of the minor that an appointment of guardian to the person or property or both should be made; and (2) who should be so appointed. Owing to transfers, the evidence in the Subordinate Court was taken before three officers, and finally on 8th March, 1898, a report was submitted recommending that a guardian should be appointed to the person and property of the minor, and that Govindrao and not the Názir should be so appointed.

The District Judge, after hearing arguments, came to the conclusion that the question of the truth and genuineness respectively of the alleged adoption and agreement set up by the oppo-

ment ought to be inquired into before an order could be made for the removal of the opponent from the guardianship which she claimed under the agreement and adoption deed. He, accordingly, on 9th June, 1898, remanded the case for further inquiry. This further inquiry was made by the First Class Subordinate Judge, who sent up, on 24th September, 1898, the evidence taken by him, but expressed no opinion on the same, as the second reference order was silent on that point. Thereupon the District Judge finally disposed of the application on 18th November, 1898, by rejecting it. He held that the first adoption set up by the applicant had not taken place; that the adoption and agreement on which opponent relied were proved, and that there were no grounds for removing the opponent from the guardianship.

The first contention urged by the appellant's pleader before us relates to the procedure followed by the District Judge in conducting the inquiry into this application It was contended that the District Judge had no power to direct a Subordinate Court to take any part of the evidence without calling for a report from that Court on the evidence so recorded; and, further, the District Judge was in error in acting upon the evidence taken during the course of the second inquiry. On the merits, it was contended that the decision of the District Judge in favour of the adoption set up by respondent, and adverse to the earlier adoption, was against the weight of the evidence, and that under any circumstances the respondent was not a proper and fit person to be recognized as guardian of the minor, as she had misappropriated the minor's property, and her interests were in conflict with those of the minor. These are the only two points which require consideration.

In regard to the first point, I feel satisfied that the objection to the procedure followed by the District Judge must be upheld. Section 13 of the Act, VIII of 1890, expressly lays down that the Court shall hear the evidence adduced in support of or in opposition to the application. It is true that section 46 permits the Court to call upon any Court subordinate to it for a *report* on any matter arising in any proceeding under the Act, and treat such report as evidence. For the purpose of making this report, the Subordinate Court may institute the necessary inquiries. This latter section does not control section 13 so as to enable the

FULL BENCH.

Before Mr. Justice Parsons, Acting Chief Justice, Mr. Justice Candy, Mr. Justice Ranade, Mr. Justice Tyabji, Mr. Justice Fulton, Mr. Justice Russell and Mr. Justice Starling.

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QUEEN-EMPRESS *v.* MALU AND QUEEN-EMPRESS *v.* NAGU *

Criminal Procedure Code (Act V of 1898), Sec. 35—Conviction of several offences at one trial—One sentence only to be passed in such cases—Sentence—Indian Penal Code (Act XLV of 1860), Sec. 71.

Where a person commits house breaking in order to commit theft, and theft, he may be charged with, and convicted of, each of these offences. In awarding punishment under the provisions of section 71 of the Indian Penal Code (Act XLV of 1860) the Court should pass one sentence for either of the offences in question and not a separate one for each offence.

If in such a case two sentences are passed, and the aggregate of these does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, that would be an irregularity, and not an illegality, calling for the interference of a Court of Appeal or Revision.

REFERENCE to a Full Bench.

The reference was made in two cases which came up before the High Court under section 438 of the Code of Criminal Procedure (Act V of 1898).

(1) In *Queen-Empress* v. *Malu Arjun and another* the accused were convicted at one trial by the Second Class Magistrate at Máhim of theft in a dwelling-house, and house-breaking by night in order to commit theft, under sections 380 and 457 of the Indian Penal Code, and sentenced to rigorous imprisonment for fifteen days and for one month separately for each offence.

The District Magistrate of Thána, holding that the separate sentences were illegal, referred the case to the High Court.

(2) In the case of *Queen-Empress* v. *Nagu Babaji* the accused was convicted by the Second Class Magistrate at Sátára upon separate charges, at one trial, of theft in a dwelling-house under section 380 and of house-breaking by night under section 457 of the Indian Penal Code, and was sentenced to one month's rigorous imprisonment for each offence, the sentences to take effect one after the other.

* Criminal References, Nos 26 and 34 of 1899.

On appeal the District Magistrate passed the following order :—

"The Second Class Magistrate's finding is wrong. He should have treated the two offences as forming one (section 35, Criminal Procedure Code, and Criminal Ruling No. 36 of 1898), and have inflicted one sentence, and not two. I, therefore, alter his finding and sentence, and find Nagu Babaji guilty of an offence under section 457, Indian Penal Code, and sentence him to two months' rigorous imprisonment."

The Sessions Judge, being of opinion that the District Magistrate's order was illegal, referred the case to the High Court under section 438 of the Criminal Procedure Code (Act V of 1898).

Both these references came on for hearing at first before a Division Bench (Parsons, Acting C. J., and Ranade, J., who referred the following questions to a Full Bench :—

(1) Whether a person who has committed house-breaking in order to commit theft and theft, can be charged with, and convicted of, each of these offences ?

(2) If so, can a separate sentence be passed on each conviction, provided that the Court does not exceed its ordinary power of inflicting punishment, and that the aggregate sentence passed does not exceed the punishment provided by law for either of the offences ?

Rão Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown :—Before section 35 of the Criminal Procedure Code was amended by Act V of 1898, there was a conflict of opinion between the different High Courts in India as to whether in a case like the present it was competent to a Court to record a separate conviction and pass a separate sentence for each of the offences charged. The High Court of Calcutta was against two separate convictions and sentences. But this Court took a different view—*Reg.* v. *Anwarkhan* [1]; *Reg.* v. *Tukaya* [2]. The Allahabad High Court agreed with this Court—*In the matter of Daulatya* [3]; *Queen-Empress* v. *Zorsing* [4]. The Madras High Court was of the same opinion : see (1869) 4 Mad. H. C. R. Appx.

(1) (1872) 9 B. C. R., 172.
(2) (1876) 1 Bom., 214.
(3) (1880) 3 All., 305
(4) (1888) 10 All., 146.

FULL BENCH.

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QUEEN-EMPRESS *v.* MALU AND QUEEN-EMPRESS *v.* NAGU.*

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(2) (1876) 1 Bom., 214.
(3) (1880) 3 All., 305.
(4) (1888) 10 All., 146.

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xxxvii. The High Courts of Bombay, Allahabad and Madras agreed in holding that a separate conviction and a separate sentence should be passed for each of the offences charged. The question is whether the new Code of 1898 has made any change in the existing law. An explanation is added to section 35 of the Code of 1882.

The illustration to the section has created the difficulty. But section 235 of the Code of 1882 is not amended or altered. Nor is section 71 of the Penal Code amended. That being the case, section 35 of the Criminal Procedure Code of 1898 should be read with section 235 of the same Code, and with section 71 of the Penal Code. Section 235 of the Criminal Procedure Code provides that a person may be charged at one trial with more than one offence. And illustration B to the section shows that he may not only be separately charged with, but also separately convicted of, each of the offences. Section 258 of the Code provides that when a charge is framed, the accused must be either convicted or acquitted. If he is convicted, a sentence must be passed according to law. It follows, therefore, that, if an accused person is charged with and convicted of several distinct offences, there must be a separate sentence for each offence. Then section 71 of the Indian Penal Code remains intact It does not deal with sentences but with the quantum of punishment. In the Full Bench case of *Queen-Empress* v. *Bana Punja* [1] it is expressly laid down by this Court that where a person is convicted of rioting and of hurt, it is not illegal to pass two sentences, one for rioting and one for hurt, provided the total punishment does not exceed the maximum which the Court might pass for any one of the offences. To the same effect is the ruling in *Queen-Empress* v. *Sakharam* [2].

H. C. Coyaji, amicus curiæ:—I submit that separate convictions and separate sentences can only follow distinct offences. Section 35 of the Code of Criminal Procedure of 1898 allow separate sentences to be passed only if the offences are distinct. But the illustration to the section shows that house-breaking with intent to commit theft and theft are not distinct offences.

(1) (1892) 17 Bom., 260. (2) (1886) 10 Bom., 493.

The explanation and illustration to this section must be read together. The object of amending the section was to make the law on this subject clear and consistent. The rulings under the old Code are, no doubt, against my contention. But the ground on which they are based was that theft and housebreaking in order to commit theft were treated as two distinct offences. But the new Code declares that they are not distinct offences. Those rulings, therefore, are no longer any authorities in point. As to the state of the law under the Code of 1872, see *Reg.* v. *Anwarkhan*[1], *Reg.* v. *Govinda*[2] and *Reg.* v. *Noujan*[3].

Section 235 (Illustration (*b*)) of the Code of Criminal Procedure is not against my contention. If the Legislature has now expressly excluded the offences in question from the category of "distinct" offences, it is not open to contend that they are distinct offences by analogy of the cases. Moreover, clause 4 of section 235 provides that nothing contained in that section affects section 71 of the Indian Penal Code. The former deals with the procedure at a trial, the latter with punishment only. Because more charges than one can be framed at one trial, it does not necessarily follow that there should be separate sentences also. The section is not imperative but enabling only: see Weir's Criminal Rulings, p. 895; see also *Queen-Empress* v. *Ugra Virchand*[4].

Upon the second question, I submit that a separate punishment upon each charge would be illegal. The offences form parts of one and the same transaction: see *Queen-Empress* v. *Muse Bagas*[5].

PER CURIAM:—We are of opinion that the first question should be answered in the affirmative.

We are also of opinion that looking at the illustration and explanation added to section 35 of the Criminal Procedure Code, 1898, it is the intention of the Legislature that a Court in awarding punishment under the provisions of section 71, Indian Penal Code, should pass one sentence for either of the offences in question, and not a separate one for each offence; but if two sentences

(1) Cr. Rul., 23rd May, 1872.
(2) Cr. Rul, 11th Dec., 1873.
(3) (1872) 7 Mad. H. C. Rep., 375.
(4) Cr Rul. for 1886, No. 59.
(5) Cr. Rul. for 1889, No. 63.

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are passed, and the aggregate of these does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, we are of opinion that that would be an irregularity only, and not an illegality requiring interference by a Court of appeal or revision.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899.
March 20.

MAHAMAD DASU (ORIGINAL DEFENDANT), APPELLANT, *v.* AMANJI DASU (ORIGINAL PLAINTIFF), RESPONDENT.*

Bhágdár—Bhágdári estate—Alienation by a bhágdár of his share—Bombay Act V of 1862, *Sec.* 3—*Collector setting aside sale of share—Subsequent suit to recover share—Limitation.*

In the year 1871 the plaintiff, a co-sharer in a bhág, alienated his share to a stranger. In the year 1882 the Collector declared the alienation to be illegal, and in the year 1883 ordered that the plaintiff should be reinstated in the possession of his share. At plaintiff's request his share was given into the possession of the defendant, who was the plaintiff's brother and khátedar of the entire bhág. In the year 1892 the plaintiff brought this suit against the defendant to recover possession of his share. The defendant contended that the suit was time-barred, the plaintiff not having been in possession since the year 1871.

Held, that the suit was not barred, the possession of plaintiff's alienee being the possession of the plaintiff himself, and the defendant not being entitled to tack to the period of his own possession that of the plaintiff's alienee.

SECOND appeal from the decision of R. J. C. Lord, Assistant Judge of Broach with full powers, confirming the decree of Chunilal D. Kavishvar, Second Class Subordinate Judge.

In 1871 plaintiff, a co-sharer in a certain bhág, sold his share to one Valli Adam, who was a stranger to the bhágdár family. Valli Adam continued in possession till the year 1883, when the Collector, who had in the meanwhile declared the sale to be illegal by an order dated the 12th January, 1882, directed that the plaintiff's share be restored to him. The plaintiff thereupon requested that, as he was not living in the village in which the bhág was situate, possession of his share should be given to the defendant, who was his elder brother and the khátedár of the entire bhág. The defendant was accordingly put into possession.

* Second Appeal, No. 575 of 1898.

1899.

MAHAMAD DASU v. AMANJI.

In the year 1892 the plaintiff brought this suit against the defendant to recover his share, contending that the defendant held possession of it as trustee for him.

The defendant denied that he held the property on plaintiff's behalf, and pleaded (*inter alia*) that the suit was barred by limitation, the plaintiff having been out of possession for more than twelve years.

The Subordinate Judge found that the defendant held the property for the plaintiff and that the suit was not time-barred. He, therefore, allowed the claim.

On appeal by the defendant, the Judge (V. V. Paranjpe, First Class Subordinate Judge with appellate powers), without recording findings on all the issues raised, reversed the decree and rejected the claim on the ground that it was time-barred, in as much as the plaintiff had not sued within three months from the date of the Collector's order as provided by section 3 of the Bhágdárs Act (Bom. Act V of 1862).

The plaintiff having preferred a second appeal, the High Court reversed the decree and remanded the appeal for a rehearing. See Printed Judgments, 1897, p. 228[1]. On the remand the Judge found that the claim was within time, and he confirmed the decree of the Subordinate Judge.

The defendant preferred a second appeal.

H. C. Coyaji for the appellant (defendant).

Gokuldas K. Parekh for the respondent (plaintiff).

PARSONS, C. J. (ACTING) :—The remand order in this case will be found in *Amanji* v. *Mahamad*[2], where the facts are clearly stated.

(1) The following the judgment of the Court :—

FARRAN, C. J. :—Following the ruling in *Haribhai* v. *Gokal* (P. J., 1897, p. 109) we reverse the decree of the lower Court and remand the appeal for rehearing upon the remaining issues. In this particular case the only order the Collector made was this—"I sanction the several portions being rejoined to the bhág." There was nothing in that order which the plaintiff could object to or sue to set aside.

We amend the sixth issue in order to raise the question suggested by Mr. Gokuldas —that the defendant can have no lien on the property for the amount expended in repairing the house, as he has enjoyed the profits of the land—by adding to the last query the words "and has the defendant a lien on the property for the same" after the sentence "what money was so spent."

(2) P. J., 1897, p. 228.

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MAHAMAD DASU v. AMANJI.

The Judge of the lower appellate Court on the rehearing found all the issues in favour of the plaintiff, and the only objection raised here now to his decision is on the ground of limitation.

It is contended that the plaintiff, who had sold his share in 1871 and had, therefore, been out of possession since that time, was barred by prescription from bringing this suit. This contention, however, is based upon a misconception of the relationship that subsists between the parties. They are both sharers in the bhág. The sale by the plaintiff of his share in that bhág and the possession of his alienee were as adverse to the defendant as they were to the plaintiff, and the action of the Collector in 1883, setting aside the sale and reinstating the owners in the possession of the bhág, was beneficial to both, and the effect of it was to restore the parties to their original condition as owners of an unencumbered bhág. It is impossible to assent to the proposition put forward on his behalf that the defendant can prefix to his possession since 1883 the possession of the alienee of the plaintiff between 1871 and 1883, and count the whole period as his possession adverse to the plaintiff; we ought rather to hold that the possession of the alienee was the possession of the plaintiff himself. In alienating the share he transferred his rights over it to his alienee for as long as the alienation lasted, and when the Collector intervened and put an end to the alienation, the effect was to reconvey to the plaintiff those same rights: the plaintiff and his alienee are thus properly to be regarded as successors in title, and the defendant in order to succeed in this suit would be bound to prove adverse possession against both. This he has not done, and the result is that his defence fails. We confirm the decree with costs.

RANADE, J.:—The appellant and respondent are brothers, and, along with two other brothers, owned equal shares in a bhág which comprised lands and houses. It is admitted that the land and house in dispute belonged to the respondent before they were alienated by him to strangers in Samvat 1927 (1871). In 1881 the appellant, as khátedár of the entire bhág, applied (Exhibit 28) to the revenue authorities for the cancellation of this alienation, and for the restoration of the land and house to the bhág entered in his kháta under section 3 of Bombay Act V

of 1862. The alienation was accordingly set aside by an order dated 12th January, 1882, and it was directed that the land and house should be restored to the bhág. The appellant wanted the land and house to be made over into his possession. The alienees were, however, willing to restore the land and house to their vendor, the respondent, and not to the appellant. An order was passed accordingly to restore the land and house to the respondent's possession, but he informed the village authorities (Exhibits 38, 54) that as he was employed in service in another village, the land and house should be made over into appellant's possession, as he had vahivat of his property, and they were accordingly made over into the possession of appellant on 31st August, 1883. The respondent later on changed his mind, and as appellant refused to give up possession, the respondent brought his present suit in 1892 to recover possession of the land and house on the ground that the appellant held possession on respondent's behalf. The appellant denied that he held possession of the property on respondent's behalf, and further contended that the respondent plaintiff's claim was time-barred.

The Court of first instance awarded the claim. In appeal it was held that respondent was entitled to be placed in possession, but as appellant did not hold possession on behalf of respondent, and, further, as respondent had not sued to set aside the final order of the Collector within three months under section 3 of Act V of 1862, the claim was time-barred. In second appeal it was held that section 3 did not apply to the case, and this Court remanded back the case for decision on the merits. The Assistant Judge has now held that the appellant had obtained possession as trustee for the respondent, and that the latter's claim was not time-barred.

It will be seen from the summary given above that the only two points about which the parties are not agreed are (1) whether appellant or respondent was entitled to the possession of the land; (2) and whether the claim was time-barred.

As regards the first point, section 3 directs that after the sale is cancelled, the Collector should restore the property to the possession of such person as he deems entitled thereto. The Collector's discretion is thus not absolute and unrestricted. He

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has to determine the question as to the claim for possession, and not of the title to the property—*Haribhai* v. *Gokal*[1]. In this case, that discretion was exercised when the District Deputy Collector ordered the Mámlatdár to restore the land to the respondent. The order in appellant's favour was made after respondent had informed the village authorities of his intention to that effect. Appellant did not obtain possession in virtue of a decision of the Collector that he was the person entitled to possession. Quite independently of this circumstance, it is clear that the alienation by respondent having been set aside under the Act, respondent's previous title revived. If, instead of complete alienation, there had been a mortgage or charge, and the Collector had interfered under the same section, and set them aside, it is clear that respondent, and not appellant, would have been benefited thereby. Even though there was no express trust in this case, there can be no doubt that the person entitled to the property was the respondent.

The next question is whether the respondent's claim was time-barred. Respondent alienated the land in 1871, and from that time down to 1892, when the present suit was brought, a period of more than twelve years intervenes, during which time respondent was not in possession, and appellant contends that the respondent had no title left to bring the suit. The appellant thus joins his own eight years' possession with the previous twelve years' possession of the alienees of respondent. If the appellant had derived his right from the alienees, his contention would have been valid. But he does not derive his title from the vendees. Their possession, being declared illegal, cannot be pleaded as adverse against the person from whom they derived their title, and who alone was entitled to possession under Act V of 1862. As between the parties to this suit, both of whom held possession of parts of the bhág, the appellant's adverse possession could only commence, at the best, in 1883. The respondent's right to recover possession is, therefore, not time-barred. We confirm the decree of the lower Court and dismiss the appeal with costs.

Decree confirmed.

P. J. for 1897, p. 109.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

MUKTABAI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* ANTAJI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1899. *March* 22.

Vatan—Daughter of a vatandár—Not a vatandár of the same vatan during her father's lifetime—Bombay Act III of 1874, Sec. 5—Bombay Act V of 1886.

The daughter of a Hindu vatandár is not during the lifetime of her father a vatandár of the same vatan within the meaning of section 5 of Bombay Act III of 1874, as amended by Bombay Act V of 1886.

SECOND appeal from the decision of L. Crump, District Judge of Sátára.

The lands in dispute formed part of a kulkarni service vatan in the Sátára District.

On 28th September, 1885, Naro Hanmant, the holder of the vatan, made a gift of the lands to his daughters (defendants Nos. 1 and 2).

In 1893 Naro died. Thereupon the plaintiffs, who were his *bhaubands* and were vatandár kulkarnis of the same vatan, filed a suit to recover possession of the lands, alleging, being service vatan lands, the gift of them to defendants Nos. 1 and 2 could not enure beyond the lifetime of the deceased Naro, and that they (the plaintiffs) alone were entitled to succeed under section 2 of Bombay Act V of 1886.

The Court of first instance dismissed the suit, holding that the defendants Nos. 1 and 2 had an hereditary interest in the vatan and were consequently vatandárs of the same vatan, and that the alienation by gift in their favour was valid under section 5 of Bombay Act III of 1874.

On appeal the District Judge, following the decision of the High Court in *Chinava* v. *Bhimangauda*[1], held that the defendants Nos. 1 and 2, as daughters of the deceased Naro, were not vatandárs of the same vatan within the meaning of section 5 of Bombay Act III of 1874, and that, therefore, the gift in their

* Second Appeal, No. 534 of 1898.

(1) (1897) 21 Bom., 487.

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favour was not valid. He accordingly decreed the plaintiffs' claim.

Against this decision the defendants appealed to the High Court.

D. A. Khare for the appellants.

V. G. Bhandarkar (with *V. K. Bhatavdekar*) for respondents.

CANDY, J.:—We agree with the District Judge that this case is governed by the decision in *Chinava* v. *Bhimangauda*[1], and that the daughter of a Hindu vantandár is not during the lifetime of her father a vatandár of the same vatan within the provisions of section 5 of Bombay Act III of 1874 as amended by Bombay Act V of 1886. We, therefore, confirm the decree with costs.

(1) (1897) 21 Bom., 787.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899. *March* 28.

ZENDOOLAL NANDLAL (ORIGINAL DEFENDANT No. 12), APPLICANT, *v.* KISHORILAL MEHTABRAI AND ANOTHER (ORIGINAL PLAINTIFFS), OPPONENTS.[1]

Civil Procedure Code (Act XIV of 1882), Se. 108—Small Cause Court—Ex parte decree—Satisfaction of the decree—Application by defendant to set aside decree.

The fact that an *ex-parte* decree has been satisfied, does not disentitle a defendant from applying to the Court to set it aside under section 108 of the Civil Procedure Code (Act XIV of 1882)

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code (Act XIV of 1882).

On the 18th August, 1897, the opponents obtained an *ex-parte* decree against the applicant in the Court of Small Causes, Bombay. The applicant was a resident at Delhi, and the decree was sent there for execution. On the 31st August the applicant's goods were attached, and he (alleging that only then did he come to know of the suit) paid the amount of the decree and costs into the Court at Delhi as *amanat* (deposit), and on the 29th September,

[1] Application No. 9 of 1899 under the extraordinary jurisdiction.

1897, applied to the Small Causes Court, under section 108 of the Civil Procedure Code (Act XIV of 1882), to set aside the *ex-parte* decree and for a re-trial. Meantime the opponents took out of the Court at Delhi the amount paid in by the applicant, and thus the decree was satisfied.

Subsequently the Judge of the Small Causes Court dismissed the application to set aside the decree on the ground that it was made too late. The applicant then appealed to the High Court (No. 21 of 1898), and that Court remanded the case to the Judge, directing him to deal with the application on the merits.

On remand the plaintiffs contended that the decree being satisfied, there could not be another trial. The applicant contended that he had paid the amount of the decree into the Court at Delhi under protest, and that he had got the receipt of the bailiff of the Delhi Court showing that it was so, and that such a payment could not prevent a re-trial.

The Judge thereupon sent the receipt to the Delhi Court for identification, but the letter enclosing the receipt was directed to the District Judge of Delhi instead of to the Deputy Commissioner in whose Court the execution proceedings had taken place. The District Judge replied that the receipt was not passed by any bailiff of his Court. The Judge thereupon rejected the application to set aside the decree on the ground that the decree had been satisfied.

The applicant applied to the High Court under its extraordinary jurisdiction and obtained a rule calling upon the plaintiffs to show cause why the order of the Judge should not be set aside.

Balaji R. Dixit for the applicant in support of the rule:—The summons was not served upon the applicant. That fact is of itself a sufficient ground for setting aside the decree. We paid the amount of the decree under protest into the Court at Delhi. It was not our doing that the Delhi Court paid out the amount of the decree to the plaintiffs, though the application to set aside the *ex-parte* decree and for a retrial was pending in the Bombay Court of Small Causes. But satisfaction of a decree is no ground for refusing to set it aside. Section 108 of the Civil Procedure Code does not impose any such limitation.

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Manekshah J. Taleyarkhan appeared for the opponents (plaintiffs) to show cause :—The decree being satisfied there is nothing to be set aside or retried. The Judge found that the amount of the decree was not paid under protest. That is a finding of fact, and this Court will not interfere, under its extraordinary jurisdiction, with such a finding of fact. The receipt of the bailiff at Delhi produced by the applicant was disclaimed by the District Judge of Delhi. The rule *nisi* should, therefore, be discharged.

PARSONS, C. J. (ACTING) :—This case was before this Court on a previous occasion (Application No. 21 of 1898) and it then ordered that the application should be heard on the merits. The Judge of the Small Cause Court has now dismissed it on the ground that the decree sought to be set aside has been satisfied. It appears that the decree was sent for execution to the Court at Delhi where the defendant resided, and that an attachment was there issued and the money was recovered. Whether it was paid under protest or not, was disputed in the Small Cause Court, and the Judge found that it was not proved that the money was paid under protest on the strength of the reply from the District Court at Delhi. It is pointed out to us that the Court which should have replied was the Court of the Deputy Commissioner, and that the District Court was necessarily ignorant of the facts. Be this, however, as it may, we are unable to hold that the fact that an *ex-parte* decree has been satisfied, disentitles a defendant from applying to a Court to set it aside under section 108 of the Civil Procedure Code. No authority has been shown to us for such a proposition, and we cannot assent to it. We direct the Judge of the Small Cause Court to obey the previous order of this Court, and to hear and dispose of the application on its merits. We make all costs, costs in the application.

Rule made absolute.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

GANGABAI (ORIGINAL OPPONENT), APPELLANT, *v.* KHASHABAI AND ANOTHER (No. 1, ORIGINAL PETITIONER), RESPONDENT.* 1899. *March* 29

Guardian and Wards Act (VIII of 1890), *Secs.* 7 (3), 8 (1), 13—*Claim to guardianship based on a will does not survive to claimant's representative —Appeal—Death of appellant pending appeal—Abatement.*

One Khashabai applied to be the guardian of the person and property of her minor son. Her application was opposed by Gangabai, the grandmother of the minor, who alleged that she had been appointed guardian by the will of the minor's father. The Judge found the will not proved, and he appointed Khashabai to be guardian. Gangabai appealed and pending the appeal she died. Gangabai's brother, one Madhavrao, thereupon applied for leave to prosecute the appeal as Gangabai's representative.

Held, refusing the application, that the appeal must abate by reason of Gangabai's death. Her appointment alleged to have been made under the will was a matter of personal preference and trust. A claim based on personal trust could not survive to her representative.

APPEAL from the decision of J. B. Alcock, District Judge of Násik.

One Khashabai applied to be appointed the guardian of the person and property of her minor son Hanmant. Her application was opposed by Gangabai, the grandmother of the minor, who alleged that she herself had been appointed the guardian under a will executed by the deceased father of the minor. At the inquiry the original will was not produced, and the Judge appointed Khashabai guardian of the person, associating the Collector with her as guardian of the property of the minor.

Gangabai thereupon filed the present appeal. Pending the hearing Gangabai died. Her brother Madhavrao now applied to have his name entered on the record as her representative and to be allowed to continue the appeal.

Shivram V. Bhandarkar appeared for the applicant:—The applicant being Gangabai's brother is her heir, and he is entitled to succeed to all the rights which Gangabai had.

* Appeal, No. 53 of 1898.

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GANGABAI v. KHASHABAI.

[PARSONS, C. J.:—In the present case Gangabai derived her right of guardianship under the alleged will, and that right being personal came to an end when she died.]

The applicant could have presented an application of his own or could have objected to an application presented by another person under the provisions of the Guardian and Wards Act. So long as Hanmant continues a minor, the applicant is entitled to move in the matter.

Bahadurji (with *Daraska Bazonji* and *Vinayak V. Ranade*) appeared for respondent No. 1, Khashabai:—Without the will, Gangabai had no independent right to the guardianship of the minor. Gangabai being the grandmother of the minor could not be preferred to the respondent, who is his mother. Any right to the guardianship conferred on Gangabai by her son's will came to an end at her death. It was not such a right as survived to her representative. This appeal, therefore, must abate.

PARSONS, C. J. (ACTING):—In this case Khashabai had applied to be appointed the guardian of the person and property of her minor son Hanmant. Her application was opposed by Gangabai, the grandmother of the minor, who claimed the right herself of being appointed the guardian under a will said to have been executed by the father of the minor. The District Judge found the will not proved and appointed Khashabai guardian of the person, associating the Collector with her as guardian of the property of the minor.

Gangabai preferred this appeal against the order and died on the 1st January last. Her brother Madhavrao has now made an application, asking that his name be entered on the record as her representative and that he be allowed to continue the appeal. The question is, whether he has the right to continue the appeal. We answer it in the negative. The objection raised by Gangabai to the appointment of Khashabai was a purely personal one. It was based upon her own appointment by the will of the minor's father, and it ceased on her death. The applicant as her representative could not continue her contention that, as a guardian had been appointed by will, an order appointing another person to be guardian could not be made under the terms of section 7 (3)

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of the Act. It cannot, therefore, be said that the right to sue, which in this case must be construed to mean the right to make the objection which Gangabai made, survived.

It was argued that as the applicant Madhavrao might himself have made an application under section 8 (*a*) to be appointed guardian or have opposed the application of Khashabai under section 13, he has the right of continuing the application and the opposition of Gangabai, but this is not a sound argument. He could only continue the action of Gangabai if he occupied her place having succeeded as her representative to her rights. This he does not do, for her rights which were based only upon the will determined with her death, and the action of her brother is based not upon the will or upon any rights derived from her, but upon rights which belonged to, and could have been exercised by him in her lifetime. It seems sufficient to say that as the applicant has not succeeded to the office of guardian as the representative of Gangabai, and does not base his opposition to the appointment on any grounds based on representation from Gangabai, he cannot continue this appeal, which must be held to have abated on the death of Gangabai. We now order the appeal to abate.

RANADE, J.:—The question at issue, *viz.*, whether this appeal does not abate by reason of the death of the appellant Gangabai, depends for its decision upon the inquiry whether the right to sue in this case survives to Madhvrao as Gangabai's heir after her death (section 365). Gangabai was opponent in an application made by Khashabai, the respondent, to be appointed guardian and administrator of the minor Hanmantrao. Gangabai chiefly relied upon the will of her deceased son, the minor's father. This will was held not proved, and the District Judge granted the respondent's application so far as the guardianship of the minor's person was concerned, and appointed the Collector and respondent to administer the estate jointly. Gangabai appealed to this Court against this order of the District Judge, and an issue was sent down for inquiry regarding the will. No evidence was given, as Gangabai died in the meanwhile. Her brother now seeks permission to prosecute the appeal as Gangabai's heir. His right to do so must obviously depend upon the right to sue or defend

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surviving to him as Gangabai's heir. Gangabai claimed the right under her son's will. Independently of the will, she had no superior right as against the respondent Khashabai. Madhavrao claims no right under this will. The appointment of Gangabai alleged to have been made in the will was a matter of personal preference and trust. Such a claim based on personal trust cannot survive Gangabai. Mr. Shivram Vithal contended that the right survived because the cause of action, according to him, was the minority of Hanmantrao, and that still continued. This is not a correct view to take. The right to sue or defend in this case rests solely on the personal preference contained in the will. The cause of action means in such cases the right to bring the action, or in this case the right to object to the claim. This does not survive to Madhavrao, who claims to be Gangabai's heir. If he claims under any special appointment made in his favour by Gangabai, he must, it is obvious, apply to the District Court and establish his right first. Such an appointment can confer no right on him to have his name substituted in Gangabai's place as appellant in this case. Mr. Bhandarkar admitted that he was unable to cite a single precedent where applications for guardianship or defences in such proceedings have been permitted to be carried on by the heirs of deceased parties. We must, therefore, hold that this appeal abates by reason of Gangabai's death.

The Collector's objection to be joint manager with the respondent will be separately dealt with by the District Judge. It cannot influence the decision of the present appeal in any way.

Appeal ordered to abate.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

TRIMBAK NARAYAN, APPLICANT, *v.* RAMCHANDRA NARSINGRAO AND ANOTHER, OPPONENTS.*

1899.
April 4

Civil Procedure Code (Act XIV of 1882), Sec. 310A, as amended by Act V of 1894—Actual receipt of sale-proceeds by decree holder necessary to set aside a sale—Sale in execution of a decree.

The words in clause (*b*) of section 310A of the Code of Civil Procedure as amended by Act V of 1894—"less any amount which may, since the date of such proclamation of sale, have been *received* by the decree holder"—contemplate an actual receipt of the amount by the decree holder. A mere payment of the sale-proceeds into Court does not satisfy the requirements of the section.

A proclamation of sale ordered that for the recovery of Rs. 813-9-9 certain immovable property belonging to the judgment-debtor should be sold in two lots, A and B. Lot A was sold for Rs. 420, and on the next day lot B was sold for Rs. 581. The judgment-debtor afterwards paid into Court Rs. 452-13-0, and applied to have the sale of lot B set aside, alleging that he had purchased lot A through a third party, and that the sale proceeds had been paid into Court.

Held, that the mere payment of the sale proceeds into Court was not a sufficient compliance with the requirements of section 310A of the Code of Civil Procedure, and as it had not been shown that the sale-proceeds had been received by the decree-holder, the sale could not be set aside.

APPLICATION under section 622 of the Code of Civil Procedure (Act XIV of 1882).

One Ramchandra Narsingrao obtained a decree against Trimbak Narayan for Rs. 813-9-9.

In execution of this decree certain lands belonging to the judgment-debtor were sold in two lots. The lands at Munjari were sold as lot No. 1 for Rs. 420 on the 6th September, 1897, and purchased by one Nagesh Shripat Nagpurkar. The lands at Moshi were sold as lot No. 2 for Rs. 581 on the 7th September, 1897, and purchased by Balkrishna Keshrinath.

On the 6th October, 1897, the judgment-debtor applied to the Court to set aside the sale of the lands at Moshi, and paid into Court Rs. 452-10-0. He alleged that the lands at Munjari had

* Application, No. 176 of 1898 under Revisional Jurisdiction.

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been purchased by Nagesh Shripat Nagpurkar as *benamidár* for the judgment-debtor, and that the purchase-money (Rs. 420) had been paid into Court on his behalf.

This application was rejected by the Court on the grounds that the auction sale of one lot only could not be set aside, and that the whole amount mentioned in the sale proclamation had not been paid into Court.

This order was confirmed, on appeal, by the District Court.

The judgment-debtor thereupon applied to the High Court under its Revisional Jurisdiction.

P. P. Khare for applicant.

G. S. Rao for opponent No. 1.

M. B. Chaubal for opponent No 2.

PARSONS, J.:—It is unnecessary for us to decide whether or not an appeal lies from an order refusing to set aside a sale under section 310A of the Civil Procedure Code, because on the merits we are of opinion that this application must fail. The proclamation of sale ordered that for the recovery of Rs. 813-9-9 certain immoveable property belonging to the applicant situated at Munjuri and Moshi should be sold,—that at Munjuri as lot No 1 on the 6th September and that at Moshi as lot No 2 on the 7th September. The Munjuri property was sold for Rs 420 on the 6th September, the Moshi property was sold for Rs. 584 on the 7th September. On the 6th October the applicant paid into Court Rs. 452-13-0 and asked the Court to set aside the sale of his Moshi property The amount deposited would be sufficient to satisfy the requirements of the section, if the Rs. 420 for which the Munjuri property had been sold could be deducted from the decretal debt and if the 5 per cent. could be calculated on the purchase-money of the Moshi property alone. It has been argued that this cannot be done, because, 1st, the 420 Rs. had not been received by the decree-holder, and 2nally, the application should be to set aside the whole sale and not merely the sale of the Moshi property, in which case 5 per cent. on the whole purchase-money would have to be deposited The first part of the argument seems to us to be sound. It has been held by the Calcutta High Court that a Court has no power

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TRIMBAK v. RAMCHANDRA.

to set aside a sale unless the judgment-debtor has strictly complied with the provisions of this section 310A—*Rahim Bux* v. *Nundo Lal Gossami*(1). The words of the section are "less any amount, which may, since the date of such proclamation of sale, have been received by the decree-holder." It cannot be said that the decree-holder has received the sale-proceeds of the Munjari property when in point of fact they have only been paid into Court, and the decree-holder may never receive them at all, because the purchaser may become entitled to receive the money back under the provisions of section 315. What the section contemplates is evidently an actual receipt by the decree-holder, and we think that nothing less than that will satisfy its requirements.

In this view of the case, it is not necessary to consider the second part of the argument. We dismiss the application with costs.

(1) (1887) 14 Cal., 321.

PRIVY COUNCIL.

RUNCHORDAS VANDRAVANDAS AND OTHERS (DEFENDANTS) AND PARVATIBAI AND OTHERS (PLAINTIFFS)

P. C.*
1899.
February 23.
March 11.

On appeal from the High Court, at Bombay

Will—Hindu law—Dharam—Bequest for "dharam"—Reversioner—Limitation Act (XV of 1877), Secs 10, 28, *Arts.* 120, 141, 144.

A bequest by a Hindu testator of moveable and immoveable property to trustees for *dharam* was held void. The objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control

Morice v. *The Bishop of Durham*(1) referred to and followed.

The testator died in 1869 leaving two widows to whom he made specific bequests "for enjoying" "the rent and for making *dharam dan*." He bequeathed the residue of his property, moveable and immoveable, to trustees for *dharm*. One of the widows died in 1871, and the other in 1888. On the death of the survivor this suit was brought in 1888 to have the bequest set aside and for administration of the estate.

* Present: LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

(1) (1804) 9 Vesey, 399; (1805) 10 Vesey, 522.

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Held, on the question of limitation, that the suit was not barred. The limitation, if applicable to the moveables, would have been under article 120, and to the immoveables under article 141 of Act XV of 1877. Article 144, which makes the period of limitation commence from the date when the possession of the defendant is adverse to the plaintiff, does not apply where the suit is otherwise specially provided for, and, therefore, had no application here. At the same time, section 28 of the Act, as to the extinction of a right by the effect of limitation running against the widows, if it had done so, would not have been applicable to the plaintiff, whose right was not derived from or through the widows, but was derived through their husband on the death of the surviving widow.

CONSOLIDATED appeals from a decree (19th February, 1897) of the appellate High Court of Bombay varying a decree (27th July, 1896) of the High Court in the original jurisdiction. See I. L. R., 21 Bom., 646.

The appellants in the principal appeal represented the late Vandravandas Purshotamdas, who was an original defendant in this suit brought on the 21st December, 1888. He was the sole surviving executor of the late Kallianji Sewji, who died childless on 6th January, 1869, leaving two widows, Cooverbai, who died in 1871, and Nenavahu, who died in 1888. He made his will on the day before he died.

The respondents, Parvatibai, executrix, and Harivalabhdas Haridas and Purshotam Mulji, executors, represented in this suit the late plaintiff Cursandas Govindji, who was nephew (brother's son) and heir of the testator. He sued to have bequests to *dharam*, made in the will, declared void. The Advocate General, on behalf of a charity said to have been set up in pursuance of the will, submitted himself to the order of the Court.

The will proved by the executors on the 2nd March, 1869, gave two properties, moveables and immoveables, to each of the testator's widows, for them to receive the income thereof for their lives.

The income of these four properties was directed by the testator to be spent by the executors, after the death of the widows, for *dharam*, which the will explained to be, "doing all good works of a permanent nature, and acting in such a manner as to give me a good name."

The questions raised in this appeal were: (1) whether the bequest to *dharam* was valid or void; (2) whether the suit was barred or affected by the law of limitation under Act XV of 1877

The pleadings, issues, and facts appear in their Lordships' judgment. See also the report of the case in I. L. R., 21 Bom., 646.

Parsons, J., in the original jurisdiction of the High Court, declared the bequest to *dharam* void, and that no part of the suit was barred by limitation. He declared that the plaintiff was entitled to the immoveable estate, and to any moveable property of the testator undisposed of at Nenavahu's death. He directed an account of the immoveable property of the testator from the 19th November, 1888, to the date of the decree, and an account of the moveables left by the widows at their deaths, distinguishing the *stridhan* of Nenavahu from the other property. The material passages in his judgment were the following:—

"On the authorities cited, and on the plain construction of the terms of the will, I have no hesitation in holding that the provisions constituting the *dharam*, and directing the executors to expend the income of the estate for *dharam*, are void. That being so there would be an intestacy as to the whole of the estate so attempted to be dealt with; and the effect of this would be that the widows of Kallianji would take not the limited estate devised to them by the will, but what is in law defined to be a widow's estate in his property."

With regard to limitation, the Judge held that article 141 of the Act XV of 1877 applied. He held that the plaintiff's title, and right to possession, would not come into being until the death of the last surviving widow, and then, and not till then, could he legally sue for the property; and that during the lives of the widows there could be no such thing as possession adverse to the heir.

There was an appeal from this judgment, the defendants contending that the bequest to *dharam* was valid, that the plaintiff's claim was barred by limitation, that Nenavahu's will disposed of her moveable estate, and that the plaintiff was not entitled to the moveable estate, which never came into the widow's possession.

The plaintiff cross-appealed, contending that he was entitled generally to all the immoveable property left by the testator, to the proceeds of what had been sold, to all the accumulations, and

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to an account of what moveable property had come to the hands of the executors.

The High Court varied the decree of the lower Court. They declared the bequest to *dharam* void, and that the plaintiff was entitled to receive from the defendant the immoveable properties which were in the defendant's possession at the death of Nenavahu, and the proceeds of the property which had been sold by him with accounts for the purpose.

The Judges (Farran, C. J., and Tyabji, J.) held 'that the possession of the executors, in so far as they were not by the terms of the will made trustees for the widows and reversionary heirs of the testator, was adverse to the widows and heirs. The executors entered into possession under the will, and acted not as trustees for the widows and heirs, but as independent owners deriving their title under the will. Such possession was adverse to the heirs, whether they consented, or did not consent, to that possession. They held under express trusts intended to defeat the title of the heirs: on failure of those trusts, no trusts arose in favour of the heirs contrary to the terms of the will. As regards the claim to Cooverbai's estate, which was all moveable, the plaintiff's claim was long since time-barred.

'As regards Nenavahu, the testator gave her full power of disposition over the income of the properties given to her for her life. She accordingly had the power to make the will which she made. The decree below must be varied by omitting the portion which directed an account of the moveables left by her.

'With regard to the bulk of the property left by the testator. First, as to the moveables left by him, and the profits of the immoveables, which the executors spent during the lifetime of Nenavahu, and with her acquiescence, the plaintiff had no claim. As Nenavahu could herself have dealt with this class of property, so she could authorize the executors of her husband to deal with it. Secondly, with regard to the *corpus* of the immoveable estate, and to such portion of the moveable, and of the profits as were unexpended at the death of Nenavahu, the plaintiff's claim to the former was not barred by limitation: to the latter his claim equally was not barred: but

Nenavahu's claim to the latter being barred at her death, the plaintiff had no fresh starting point from that period.' With regard to the invalidity of the gift in *dharam*, the High Court held that it was concluded by authority "until that law shall have been differently expounded by a superior tribunal." They observe that "it is doubtless the case that this interpretation of the law defeats in innumerable instances the cherished wishes of Hindu testators. Few Hindu wills that we have met with are without a devise of this nature, though some testators define with precision the objects of their *dharam*, and it may well be that the Courts would have acted with more regard to native feelings and ideas if instead of considering the broad signification that the word '*dharam*' indisputably bears, which appears to be as wide as the words philanthropy, or piety, or charity, in its untechnical sense, they had considered the objects which the Hindu shástras and Hindu testators would consider to be embraced within the term, and construed it in reference to the Hindu sacred law relating to *dharam*. These objects might, we think, be exhaustively enumerated under a few heads which would, even now, with advancing ideas, not be wider than the objects which are deemed to be 'charitable' by the Courts in England, and would not embrace such objects as are suggested in the argument in *Macduff* v. *Macduff*[1]. In a native Court untrammelled by English precedents or decisions, we can hardly doubt but that a devise in *dharam* would be upheld and applied." "We agree with the Division Court that the devise to *dharam* is too general and too indefinite for the Court to enforce, and is, therefore, void."

On the 8th March, 1897, the appellants petitioned to appeal on the grounds: (1) that the bequests to *dharam* were good and valid; (2) that the plaintiff was not entitled to possession of any immoveable estate of the testator other than those of which Nenavahu died possessed, his claim being barred by limitation. The plaintiff petitioned in cross-appeal that he was entitled generally to all the immoveable estate of the testator, and that his claim should not have been limited to such of it as was in the possession of the defendant at the death of Nenavahu. The Court ought to have held that "by reason of the devise to *dharam* being inca-

(1) (1896) 2 Ch., 45[1].

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pable of enforcement, the executors become express trustees of the whole estate not validly disposed of by the will for the heirs of the trustees." The plaintiff further claimed all the moveable estate not validly disposed of by the widows during their lifetime.

J. D. Mayne and *H. Cowell*, for the appellants, the representatives of the surviving executor and trustee, argued that the bequest to *dharam* was valid. By the use of that word were intended such objects as Hindus deemed to be incumbent upon, or for the benefit of, the testator in a future state, and not such objects as only would correspond to charitable objects in the sense understood by the English Courts. It was rather the clause in the regulation enacting that Indian Courts should be guided by the justice, equity and good conscience that should govern the construction of the word *dharam* as used in this will. This rule was generally taken as derivable from the law of the English Equity Courts. But the latter were no guide on this subject, keeping in view, as they did, the principles of securing objects of public charity, and maintaining the analogy of the statute of Elizabeth. Reference was made to the Civil Procedure Code, 1882, section 539. The Court in the present case could settle a scheme, there being nothing in the bequest contrary to the Hindu law, as that law, relating to wills, was enforced in the British Courts —*Soorjeemoney Dossee* v. *Denobundoo Mullick*[1]. It had been held below that the question, whether a gift to *dharam* was valid, was not an open one. It was, however, not concluded by authority before this Committee. The decisions which the appellant sought to have over-ruled were, principally, The *Advocate General* v. *Damothar*[2], *Gangbai* v. *Thakur Mulla*[3] and *Pranjivandas Tulsidas* v. *Devkuvarbai*[4]. Reference was made to *Lakshmishankar* v. *Vaijnath*[5], where a gift for the performance of ceremonies and to feast Bráhmins was held valid—*Cursandas Govindji* v. *Vundravandas*[6], *Deshankar Naranbhai* v. *Motiram Jageshvar*[7]; *Dwarkanath Bysack* v. *Burroda Persaud*[8]; *Bai Moticahu* v. *Bai Mamubai*[9].

(1) (1862) 9 Moore Ind Ap. 123, p 135.
(2) (1852) Perry, Oriental Ca., 526.
(3) (1863) 1 Bom. H. C. Rep., 71.
(4) (1859) 1 Bom. H. C. Rep., 75, in note.
(5) [illegible]
(6) (1889) 14 Bom., 482.
(7) (1893) 18 Bom., 136.
(8) (1878) 4 Calc., 443.
(9) (1897) 21 Bom., 709; 24 Ind. Ap., 93.

In regard to limitation :—An adverse possession for more than twelve years would have extinguished the widows' right. After that they could not have sued on their title. Under section 28 of Act XV of 1877 their title would have been gone. They represented the estate. The plaintiff in this suit was not at the date of the last widow's death "entitled to possession" within the meaning of the Act in article 141, which did not give a fresh cause of action but only a new starting point for limitation. No doubt the reversioner's claim was through the deceased husband, and not through the widows. But still, if the widows' title had been extinguished, there would have been no estate existing to which he could succeed at the date of the last widow's death. Reference was made to *Nobin Chunder Chucherbutty* v. *Issur Chunder*(1), *Amirtolall Bose* v. *Rajonee Kant Mitter*(2), *Srinath Kur* v. *Prosunno Kumar Ghose*(3); *Hanuman Prasad Singh* v. *Bhagauti Prasad*(4); *Hurrinath* v. *Mothoor Mohun Goswami*(5), *Lachhan Kunwar* v. *Anant Singh*(6).

J. Jardine, Q. C., and *J. H. A. Branson*, for the respondents, cross-appellants, contended that in holding the bequest invalid the High Court had been right. *Dharam* was not defined in any of the cases that had been cited. It was a vague term, probably including both benevolence and religion. H. H. Wilson, in his "Glossary of Indian Terms," p 137, translated the word as meaning "law, virtue, legal or moral duty." No Court could give effect to the intention of a testator using this term in its widest sense. The objects need not be of a public nature even, but might be one of the private religious acts regarded among Hindus. Gifts to *dharam* had been declared invalid fifty years ago. In Bombay there was an early case in Perry's Oriental Cases already cited, but, in Calcutta, *Sibchunder Mullick* v. *Treepoorah Soondary Dossee*(7) was before it. As there was no Hindu law for the construction of a will on this subject, the analogy of English law was taken as a guide. The gift was by that law void for vagueness—*Macduff* v. *Macduff*(8).

(1) (1868) 9 Cal W. R., 505; B. L R., Sup. Vol, 1008.
(2) (1874-75) 2 Ind. Ap., 113, 121.
(3) (1888) 9 Calc., 934.
(4) (1897) 19 All., 357, at p. 371.
(5) (1893) 20 Ind. Ap., 183; 21 Calc., 8.
(6) (1894) 22 Ind. Ap., 25; 22 Cal, 445.
(7) (1842) Fulton, Rep. 98, 109.
(8) (1896) 2 Ch., 451, 463, 470.

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With regard to limitation, assuming the trustees' possession to be adverse to the widow, and even that her rights were barred, still the reversioner's claim in this suit was not barred. By the operation of article 141 of Act XV of 1877, adverse possession during the life of the widow did not prevent this suit. As to this were cited *Ram Kali* v. *Kedar Nath*(1); *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami*(2); *Massumat Lachhan Kunwar* v. *Anant Singh*(3); *Hanuman Prasad* v. *Bhagauti Prasad*(4). But the possession of the trustees was not, either in law or in fact, adverse to the widows, even as to the moveables. The widows took the moveables, as they were at the testator's death, with full power of disposition, subject to whatever remained undisposed of by them reverting to the husband's estate, and passing to his heirs at the surviving widow's death. So far as the trustees had possession, it was in trust all the time for those beneficially interested therein, and that trust was for a specific purpose, to use the words of the Indian Legislature, the words "express trust" being the words used by the English Courts and enactments.

Reference was made to *Patrick* v. *Simpson*(5), *Salter* v. *Cavanagh*(6), among English cases, and among Indian, to *Tallubhai Bapubhai* v. *Manhuvarbai*(7). Those decisions were on this principle, that if the donee under a will is made a trustee, and he does not take any beneficial interest, the trusts are express trusts.

[LORD MACNAGHTEN here referred to *Lyell* v. *Kennedy*(8).]

Thus the cross-appellants were entitled to hold the present decree as respondents, and also were entitled to all the immoveable estate of the testator, without the claim being restricted to such of the testator's property as was in the possession of the appellants at the death of Nenavahu, the surviving widow. And it should be held that in consequence of the bequest to *dharam* failing as invalid, the executors under the will had become trustees of all the testator's estate not validly disposed of by the

(1) (1892) 14 All., 156.
(2) (1893) 20 Ind. Ap, 183; 21 Calc., 8.
(3) (1894) 22 Ind Ap., 25; 22 Calc., 445.
(4) (1897) 19 All, 357.
(5) (1889) 24 Q. B D, 128.
(6) (1838) 1 Dr. and Wal., 668.
(7) (1876) 2 Bom., 388, 414.
(8) (1889) 14 Ap. Ca., 437.

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will. They were trustees for the heirs of the testator. The respondents were also to inherit all the moveables undisposed of, at the death of the surviving widow, by the widows in their lifetime.

J. D. Mayne, in reply, argued that the appellants were not deprived of the right to rely on limitation under section 20 of Act XV of 1877, if there should be understood to be only a resulting trust in favour of the respondents instead of a trust for a specific purpose, or express trust. He referred to *Dickenson* v. *Teasdale*[1], *Cunningham* v. *Fool*[2] and *Lyell* v. *Kennedy*[3]. In the Indian Law of Limitation the rules applied to every suit or proceeding which was not specially excepted. He referred to *Balwant Rao* v. *Puran Mal*[4], *Kherodemoney Dossee* v. *Doorgamoney Dossee*[5], *Cowasji Nowroji Pochkhanawala* v. *Rustomji Dossabhoy Setna*[6], as showing against what persons the trustees would hold adversely. Even if the law as explained by the High Court, in regard to cases that fell under Act IX of 1871, had been altered by the later enactment XV of 1877, it would still be necessary for the reversioner to make out a title to an existing estate. However, not only would the widow's title have been barred under article 141 by the adverse possession of the trustees, but under section 28 her right would have been absolutely extinguished, with the result that there would have been no estate for the reversioner to get; although the period within which he could sue commenced, for such a suit as the present, under article 141, from the date of the death of the widow.

Afterwards on March 11th, 1899, their Lordships' judgment was delivered by

SIR RICHARD COUCH:—Kallianji Sewji, a Hindu who died on the 6th of January, 1869, made his will on the previous day in the following terms.

After specifying his immoveable and moveable property and giving to his wife Nenavahu a piece of land and a house and to his other wife Cooverbai a garden and a house the will says:—

(1) (1862) 1 De Gex., J. and S., 52.
(2) (1878) 3 Ap. Ca., 974.
(3) (1889) 14 Ap. Ca., 437.
(4) (1883) 10 Ind. Ap., 90; 6 All., 1.
(5) (1878) 4 Cal., 455.
(6) (1895) 20 Bom., 511.

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"According to these particulars out of the above-mentioned estates belonging to me the above-mentioned estates four in number have been given to my wives for enjoying the rent (thereof) and for making *dharam dan* (charitable or religious gifts, &c.) (of the same), and whatever other estates belonging to me remain and whatever profit appertaining to my share may remain after deducting the debts, &c, in my books belong wholly to me personally. I have during my lifetime appointed three persons trustees over the same."

(Here follow the names of the trustees.)

"According to these particulars I have appointed trustees. The said trustees are to act in such manner as they think proper for preserving my name so that my money might always be used for some good *dharam* (religious or charitable purpose) after my death (and) by which good might be done to me. No one shall have any right (or) claim whatsoever thereto."

(Then there is a direction to make certain monthly payments out of the *dharam* fund to his brother, step-mother and step brother.)

"Further it is as follows—As to the estates which have been given by me to my wives they are to enjoy the rents of the said estates during their natural lives, and on the death of my wives the said estates are to revert to my *dharam* (religious or charitable fund), and whatever income may be derivable from the said estates is to be expended for my *dharam* (religious or charitable purposes)."

On the 2nd of March, 1869, probate of the will was granted to the persons named in it as trustees. Cooverbai died in 1871 and Nenavahu in 1888. On the 21st of December, 1888, after her death Cursondas Govindji, who was the heir-at-law of Kallianji Sewji, brought a suit in the High Court at Bombay against Vandravandas Purshotumdas, the sole surviving executor and trustee, who having died is now represented by the appellants Runchordas and others his executors and executrix and also against the Advocate General of Bombay. Cursandas Govindji having also died during this appeal is now represented by the respondents Parvatibai and others, his executrix and executors.

The plaintiff in his plaint submitted that the bequests in the will for *dharam* were void and inoperative, and the property which was the subject of them was undisposed of by the will, and prayed that the estate might be administered under the direction of the Court, and it might be declared that the bequests for *dharam* were void. This was disputed by the first defendant, the Advocate General submitting himself to the order of the Court. Issues were settled, one being whether the suit is barred by limitation and another whether the bequests to *dharam* are void.

The other issues need not be noticed. The learned Judge of the High Court who tried the suit held "that the provisions constituting the *dharam* and directing the executors to expend the income of the estate for *dharam* were void, and that the suit was not barred by limitation." Vandravandas Purshotamdas appealed, and the appeal Court held that the devise to *dharam* "is too general and too indefinite for the Court to enforce, and is, therefore, void." It also held that the suit was not barred by limitation for the immoveable properties.

It is not necessary for their Lordships to refer particularly to the cases in the Indian Courts where it has been held that a devise or bequest for *dharam* is void for vagueness and uncertainty. They begin at an early period both in Bombay and Calcutta, and according to the judgment of the appeal Court are numerous. The reasons for the decisions of the English Courts upon devises or bequests of a similar nature are stated by Lord Eldon in his judgment in the leading case of *Morice* v. *Bishop of Durham*[1]. He says (10 Ves., 539). "As it is a maxim, that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust: a trust, therefore, which, in case of maladministration, could be reformed and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided that the Court can neither reform maladministration nor direct a due administration." Lindley, L.J., refers to this judgment (*In re Macduff*[2]) and says: "That is the principle of that case and has been enunciated or repeated from time to time." In the latter case the words of the bequest were "purposes charitable or philanthropic." In Wilson's Dictionary "*dharam*" is defined to be law, virtue, legal or moral duty, and the language of Lord Eldon applies as strongly if not more so to *dharam* as to the words used in the English cases. The objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control.

(1) (1804) 9 Ves., 399; 10 Ves., 522. (2) (1896) 2 Ch., 463.

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It is, therefore, necessary to decide the question of limitation. The Act which is applicable to this case is Act XV of 1877. The plan of this Act following the plan of the repealed Act IX of 1871 is to specify, in the second schedule to it, the period of limitation for every description of suit. The division of them is so complete that the schedule contains 180 articles or divisions in three columns headed, 'Description of suit,' 'Period of limitation,' 'Time from which period begins to run.' Article 111 is that which applies to the present suit. It is "like suit (for possession of immoveable property) by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female. When the female dies." The period given is twelve years. Article 144, which makes the time begin to run from when the possession of the defendant becomes adverse to the plaintiff, is not applicable where the suit is otherwise specially provided for. The article which applies to the moveable property is 120 in which the time (six years) begins to run when the right to sue accrues. The suit, therefore, for both kinds of property is not barred by the Act.

The learned counsel for the appellants relied on section 28, which provides that at the determination of the period limited for instituting a suit for the possession of property the right to the property shall be extinguished. The obvious answer to this argument is that in this case the period limited is not determined. It is not necessary to consider what might be the case if the widows or the survivor of them were suing, as the plaintiff does not derive his right from or through them, and the extinguishment of their right would not extinguish his.

It has been held by the appeal Court as to the moveable property (if any) in the hands of the defendant at the death of Nenavahu and the rents and profits of the immoveable properties in the defendant's hands at the same period that her claim was barred at her death and that there is no provision of the Limitation Act which gives the plaintiff a fresh starting point from that period. Accordingly the appeal Court has varied the decree of the first Court. Their Lordships do not agree to this view. The right of the plaintiff to this property (if any) accrued at the death of Nenavahu. The decree of the first Court, dated

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27th July, 1896, should not have been varied as it has been. It is for an account of the moveable property left by Cooverbai and Nenavahu at the time of their death distinguishing between such of it as was their *stridhan* and "as such" formed part of the estate of the testator. "As such" appears to be an error for "such as." With this alteration their Lordships think the decree will be right.

Their Lordships will, therefore, humbly advise Her Majesty to dismiss the principal appeal (No. 44 of 1898), and in the cross appeal (No. 45) to set aside the order of the appeal Court and affirm the order of the first Court with the alteration mentioned. The appellants in the principal appeal will pay the costs of both appeals.

Principal appeal dismissed: cross appeal allowed.

Solicitors for the appellants and respondents on the cross appeal:—Messrs. *Payne and Lattey.*

Solicitors for the respondents and cross-appellants.—Messrs. *Nicholl, Manisty and Co.*

ORIGINAL CIVIL.

Before Mr. Justice Candy, and, on appeal, before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Tyabji.

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June 23.

KASAM HAJI MITHA, PLAINTIFF, *v.* THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED, DEFENDANTS*

Insurance—Covering note—Slip—Policy—Concealment of material fact

On the 15th March, 1897, the plaintiff, who was a shipper of salt, applied for and obtained from the defendants' company in Bombay a preliminary "covering note" for Rs. 51,000 for salt to be shipped by him from Bombay to Calcutta. The covering note stated that a stamped policy in completion thereof would be issued on receipt of particulars. The plaintiff's practice was to bring salt from his salt works at Uran in native prows and to put it on board steamers in Bombay harbour. On the 14th April, 1897, the plaintiff put 591 bags of salt on board a prow for shipment in the British India steamer "Nairung." The transhipment commenced on the 27th April. Forty-nine bags had been transhipped when a storm arose and the prow shipped water and sank with the remaining 545 bags on board, which were thus wholly lost. Their value was

* Suit No. 531 of 1897. Appeal No. 993.

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Rs. 4,360. On the 29th April, 1897, the plaintiff applied to the defendants' company for a policy and paid the premium, and on the 30th April a policy of insurance was issued to him. It was "an insurance (lost or not lost) at and from Bombay to Calcutta upon any kind of goods and merchandise and freight of or on the ship or vessel called the 'Nairung' including all risk of craft and boat to or from the ship or vessel." Upon this policy the plaintiff sued to recover the value of the lost salt, *viz.*, Rs. 4,360. The defendants pleaded that the covering note of 15th March, 1897, did not constitute a completed agreement for the insurance of the salt; and as to the policy they pleaded that it was void, inasmuch as the loss had already occurred at the time of issue and that the plaintiff had concealed the fact from them. The plaintiff alleged that the information of the loss was given on the 27th April when the policy was applied for, and he further contended that in any event the defendants were liable, inasmuch as the covering note of 15th March, 1897, was a complete and final contract binding upon the defendants, whatever events might subsequently have happened.

Held, affirming Candy, J., that the plaintiff was not entitled to recover.

SUIT on a policy of marine insurance.

Plaintiff sued the defendants to recover a sum of Rs. 4,360 under a policy of insurance dated the 30th April, 1897.

The plaintiff dealt in salt, which he brought in prows from Uran and put on board steamers in Bombay harbour. He had for several years insured the goods thus shipped with the defendants' company. The practice was, in the first instance, for him to obtain "covering notes" from the defendants, and subsequently to apply for and obtain a policy of insurance.

On the 15th March, 1897, the defendants' company issued the following covering note to the plaintiff:—

"THE BRITISH AND FOREIGN MARINE
"INSURANCE COMPANY, LIMITED.

"Preliminary Covering Note, 3 P.M.,

"*Bombay, 15th March* 1897.

"To KASAM H. MITHA, Esq.

"DEAR SIR.—We have noted your application in the above company as under, and a stamped policy in completion thereof will be issued on receipt of particulars.

"Amount Rs. 51,000 on salt. Any B. I. (*i.e.*, British India steamer) and/or Asiatic steamer or steamers from Bombay and salt ports to Calcutta at 3 per cent.

"This note will be null and void on departure of the vessel from port of sailing.

"*N. B.*—From 25th May to 31st August, both inclusive, risk of boats alongside the vessel between sunset and sunrise is not covered by this acceptance.

"Yours faithfully,

"(Signed) MACKINNON, MACKENZIE, & Co.,
"Agents."

At the end of that month some salt was shipped by the plaintiff on a B. I. (British India) steamer (the "Nurani"), but no particulars were given to the defendants of that shipment and no policy was issued in respect of it. But on the 14th April the plaintiff put on board the prow "Putli" at Uran 594 bags of salt for shipment on the B. I. steamer "Nairung." There was some delay in bringing the prow alongside the "Nairung," but this was done on the 27th April. On the 27th April, 1897, the transhipment of the bags from the prow to the "Nairung" was commenced. Forty-nine bags had been put on board the steamer, when a storm arose and the prow shipped water and sank with the remaining 545 bags on board, which were thus wholly lost. The value of the salt was alleged to be Rs. 4 per maund, and there were two maunds in each bag. The sum sued for, *viz.* Rs. 4,360, was the value of the lost salt.

On the 29th April, 1897, the plaintiff applied to the defendants' company for a policy and paid the premium. He stated at the hearing that it was his practice when applying for a policy to give the particulars and that he did so after the salt had been shipped. On the 30th April a policy of insurance, to the amount of Rs. 60,000, on 15,000 maunds loose salt was stamped and issued to the plaintiff. It was "an insurance (lost or not lost) at and from Bombay to Calcutta upon any kind of goods and merchandise and freight of and in the ship or vessel called the 'Nairung,' including all risks of craft and boats to and from the ship or vessel."

The plaintiff in this suit sought to recover under this policy the value of the lost salt, *viz.* Rs. 4,360.

In their written statement the defendants contended that the covering note of the 15th March, 1897, did not constitute a com-

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pleted agreement for the insurance of 594 bags which the plaintiff had intended to ship on board the "Nairung." They admitted the subsequent issue of the policy on the 30th April, 1897, but alleged that it was issued before they received any notice of the loss. The fourth paragraph of the written statement was as follows :—

"The defendants say that at the time the plaintiff paid the said premium, and before the said policy was issued, the plaintiff knew or ought to have known of the loss in the plaint alleged, but that he neglected to communicate the same to the defendants, and that in consequence thereof, and by reason of the said loss having already taken place, the plaintiff has no right to recover from the defendants in respect thereof"

The defendants further contended that if and so far as they were liable under the covering note, such liability had already been extinguished by previous shipments of the plaintiff, and that the plaintiff could not recover the sum now claimed.

The following issues were raised at the hearing :—

1. Whether there was any completed agreement between the plaintiff and defendants for the insurance of the 594 bags of salt in the plaint referred to for the loss of such bags.

2 Whether the defendants are liable, by reason of the policy in the plaint referred to, to indemnify the plaintiff against the loss of the said bags.

3. Whether the said policy is not void by reason of the concealment of the loss of the said bags at the time the said policy was effected.

4. Whether the defendants by reason of the covering note in the plaint mentioned are liable to indemnify the plaintiff for the loss of the said bags.

5. Whether the liability of any of the defendants under the said covering note had not been exhausted by reason of the previous shipments by the plaintiff before the loss of the said bags.

Lang (Advocate General) and *Macpherson* for plaintiff:— They cited *Cory* v. *Patton*[1]; *Lishman* v. *Northern Maritime Insurance Company*[2].

Scott and *Lowndes* for defendants:—The policy of insurance was subsequent to the loss. The fact of the loss was concealed from the defendants when the policy was applied for, and there-

(1) (1872) L. R., 7 Q. B., 304; S. C (1874) L. R., 9 Q. B., 577.
(2) (1875) L. R., 8 C. P., 216; S. C. (1875) L. R., 10 C. P., 179.

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fore, the policy is void. The covering note merely gives the right to demand a policy, but does not validate the policy; if otherwise it would be void. If the covering note had any further force, then we say it was exhausted at the date of the policy, because salt to the full value had been previously shipped on board the "Nurani" for which no policy was taken.

CANDY, J.:—This is an action on a policy of marine insurance made by the defendants with the plaintiff and dated 30th April, 1897.

Plaintiff is a large shipper of salt, his works being at Uran, whence he brings the salt in prows and puts it on board steamers in Bombay harbour. On 15th March, 1897, defendants as agents for the British Foreign Marine Insurance Company addressed a preliminary covering note to plaintiff, which is in a printed form, and runs as follows:—"We have noted your application for insurance in the above company as under, and a stamped policy in completion hereof will be issued on receipt of particulars. Amount Rs. 51,000 on salt F. P. A. per any B. I. and for Asiatic steamer or steamers from Bombay and salt ports to Calcutta. This note will be null and void on the departure of the vessel from port of sailing." The words above were filled in with ink. The form is apparently one meant to apply to a particular vessel named therein. But it is admitted that in some prior transactions between the parties the form has been filled in as shown above, no vessel being named.

Towards the end of March, 1897, plaintiff did ship 11,791 maunds salt on the B. I. S. S. "Nurani;" but it is admitted that no particulars were given to defendants of that shipment, no premium paid, and no policy issued by defendants for the same. On 11th April, 1897, plaintiff had put on the prow "Putli," at Uran, 591 bags of salt (each bag containing 2 maunds) for shipment on the B. I. S. S. "Nairung." Delay (for which plaintiff is apparently in no way to be blamed) occurred in bringing the prow alongside the "Nairung," but this was eventually done; and on 27th April, 1897, the salt was being shipped on board the "Nairung." After 49 bags had been put on board, a gale sprang up, the prow was sunk, and the remaining 545 bags were lost.

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Plaintiff's son Suleman and the clerk Murlidhar say that they, on that very day, went to the defendants' office and informed the head clerk Atmaram of the loss. Defendants deny that any information of the loss was given on the 27th April. On the 29th April the premium on the policy in suit was paid, and the policy was stamped and dated on 30th April.

The policy was in the ordinary form to the amount of Rs. 60,000 (lost or not lost) at or from Bombay to Calcutta upon 15,000 maunds loose salt in the S. S. "Nairung," including all risk of craft and boats to and from the ship or vessel. On 30th April plaintiff wrote to defendants notifying the loss and enclosing the protest, bill, and policy. Correspondence ensued, defendants taking the position that the loss had occurred before the policy was taken out, so they were not liable under the policy, and that the covering note had been exhausted by the shipment on the "Nurani" in March, 1897. On that latter point the finding must be against the defendants. Plaintiff says that he did not insure the shipment on the "Nurani," because he had received instructions from his Calcutta firm not to insure that shipment as shown by the letter D. The genuineness of that letter is attacked by the defendants; and there are obvious considerations in regard to it which cannot be overlooked. But it is unnecessary to deal further with the point, for whatever may have been the motive for plaintiff not insuring his salt shipped on the S. S. "Nurani," the fact remains that, whether with sinister intent or not, he did not make any declaration of particulars or take out any policy for the "Nurani" shipment.

No mercantile practice has been alleged by which plaintiff would be compelled for the first shipment after the date of the covering note to take out a policy. Therefore, as long as the covering note of 15th March, 1897, was not expressly cancelled, it remained in force. No authority pointing to the contrary conclusion has been quoted. As to the words "lost or not lost" in the policy, they do not affect the question whether the policy can be avoided as regards the loss of the 515 bags on the 27th April, 1897. (See Arnould, 6th Ed., p. 235, and Phillips, 5th Ed., Section 925.)

Of course if it be a fact that plaintiff's son Suleman and his clerk Murlidhar (as they state) went straight from the S. S. "Nairung" to defendants' office on 27th April, and gave information of the loss to the head clerk Atmaram, then there is an end of the case. If defendants chose to effect a policy with full knowledge that loss had actually happened, they must be bound by it. (Arnould, 6th Ed., p. 235.) But I am not satisfied that in the present case the underwriters had such full knowledge. Suleman deposed that he told Atmaram that the prow had sunk, "and as my father was ill, should we write to the defendant company? Atmaram replied we need not write, as we were not in the habit of doing so." Suleman was not cross-examined on this, but Mr. Scott for defendants asked the Court to note that he did not admit the alleged interview with Atmaram. Murlidhar deposed that he and Suleman gave information of the loss, and "Atmaram told us to give a protest in writing to that effect. . . . . I am sure that Atmaram said to us to give something in writing." Atmaram in his deposition stated that he could not remember any such interview. He admitted that previously (as stated by Mr. Currie in his affidavit) losses had been reported verbally to him and by him to his master. (Mr. Currie stated that in four instances the losses were reported to the defendants verbally by the plaint', who produced the tindal's notarial protest.) But from the fact that this loss was not reported by him to his master, Atmaram stated that no such verbal information had been given to him. In this conflict it is expedient to look at the conduct of the parties. There is an obvious inconsistency in the stories told by Suleman and Murlidhar. Plaintiff's counsel contended that they were speaking of different writings: the one of a written information of the loss; the other of the notarial protest. But if it was the practice to give verbal information of the loss when the protest was handed in, what was the object of Suleman's query to Atmaram, and how are we to reconcile Atmaram's answer that no writing was necessary with the answer that some writing was necessary? Atmaram gave his evidence fairly enough; he did not try to prove too much. He could not swear no information was given on 27th, but he gave his reason for holding that it could

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not have been given. He is supported by the conduct of the parties as shown by the correspondence. Plaintiff having obtained the policy (and not till then) wrote: "We have to bring to your knowledge the fact that a part of the which was covered under your policy, &c." The Learned Advocate General for plaintiff argued that plaintiff was not writing a lawyer's letter, and that the expression must not be too closely criticised. But it would not require a lawyer's acumen to state the obvious and vital fact that information had been given previously. Even when defendants replied that they disclaimed liability, because the policy was dated the 30th, while the goods were said to have been lost on 27th, plaintiff did not state by way of rejoinder that information had been given on 27th. He simply relied on the fact that defendants by the covering note had undertaken to issue a policy. Even in the plaint there is no hint of such information on the 27th. The only allusion is to the notice of the claim on the 30th April. For all these reasons I cannot hold that plaintiff has established the allegation that information of the loss was given on 27th April. It is not pretended that information was given on the 29th, when the premium was paid and the receipt taken.

Plaintiff's counsel in support of his contention that, even under these circumstances, plaintiff can recover, relies on the principle laid down in *Cory* v. *Patton*[1] that where underwriters have (as by initialling the slip) made a complete and final contract binding upon them in honour and good faith, whatever events may subsequently happen, the assured need not communicate to the underwriters facts material to the risk insured against, which came to his knowledge between the time of initialling the slip and that of signing the policy, and the non-disclosure of such facts will not vitiate the policy of insurance afterwards executed. So here it is contended the covering note was available—(see Stamp Act, Schedule II, Article 16) to compel the delivery of a policy according to the contents of the covering note,—that is, on salt for the amount of Rs. 51,000 per any steamer or steamers of the B. I. Company or of the Asiatic Company. No exception

(1) (1872 L. R. 7 Q. B., 304.

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has been taken by defendants to the validity of the policy which was taken out on 30th April on the ground that it is for Rs. 60,000, not Rs. 51,000. Plaintiff's explanation of the increase in the amount may or may not be true. That is beside the question. But it is contended that the fact remains that as long as the vessel of the B. I. or Asiatic Company desired by plaintiff to be entered in the policy had not left the port, plaintiff could compel defendants to issue a policy for suit per that vessel. And if the principle laid down in *Cory* v. *Patton* is rightly applied to the present case, then the fact that part of the goods covered by the policy had actually been lost, which fact was not disclosed by plaintiff to defendants before or when the policy was called for, would not free the defendants from their liability.

For defendants their learned counsel argues that the above principle will not apply, because in *Cory* v. *Patton* the slip which was initialled by the underwriters specified the ship, so that there was a complete contract in all particulars. Here, on the contrary, the covering note was general any steamer of certain companies. Mr. Scott pointed to the remarks in *Ionides* v. *Pacific Insurance Co.*[1] (the reasoning in which case was the foundation of the judgment in *Cory* v. *Patton*), where Blackburn, J., delivering the judgment of the Court, and speaking of the declaration which has to be made on a policy "on goods by ship or ships to be declared," says: "Nor is it necessary that the declaration should do more than identify the adventure and so prevent the possible dishonesty of a party insured, who might intend to apply the policy to particular goods, so that they should be at the risk of the assurers, and he should come on them if there was a loss; and then when those goods had arrived safely, to pretend that he intended to apply the policy to another set of goods still subject to risks—*Harman* v. *Kingston*[2]; *Robinson* v. *Touray*[3]. Here the defendants not unnaturally say, to allow the plaintiff to recover on this policy is to allow him to commit a possible fraud, for it is quite possible that plaintiff having obtained the covering note of 15th March,

(1) (1871) L. R. 6 Q. B., 674, at p. 682. (2) 3 Camp., 150.
(3) 3 Camp., 158.

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1897, intended to take out the policy for the salt shipped on the "Nurani," but finding that that salt was all safely shipped, the chief risk being in the Bombay harbour, he took out no policy and pretended that he intended to apply the policy to other goods. When he found that some of his salt, while being shipped on the "Nairung," was lost, he naturally took out a policy with the name of that steam-ship entered.

On a careful consideration of the principle involved, I have come to the conclusion that Mr. Scott's argument must prevail. For what does the preliminary covering note purport to recite? An agreement to issue a stamped policy on receipt of particulars. Those particulars do not necessarily include the name of the vessel. It is obvious from the slips in Exhibit B that the same form is used even though the vessel is named in the preliminary covering note. The particulars relate to the subject-matter of the policy, which was afterwards declared to be "15,000 maunds loose salt." It would have been quite open to plaintiff on payment of the premium to call upon defendants to issue the policy to the amount of Rs. 51,000 on 15,000 maunds loose salt in "any B. I. or Asiatic steamer or steamers." That would have been equivalent to a policy "on board ship or ships" the limitation merely being as to the steamers of the two companies named. So far only can it be said that there was a complete contract between the parties on 15th March, 1897. If, then, in equity the defendants must be considered as having issued such a policy on 15th March, 1897, could plaintiff recover for the loss on 27th April? The answer is 'no,' because he did not declare the ship as soon as he was aware of it, and, if possible, before the loss. He could have declared the ship any day after 17th April when he put the goods on the prow to be shipped on the S. S. 'Nairung' To allow him to wait till a loss actually occurred, prior to the vessel leaving the port, before he actually named the ship, would be to offer a temptation to fraud. As the policy was intended to include all risk of craft and boats to and from the ship or vessel, plaintiff was bound to name the vessel when he had put the goods on the boat to be shipped on the vessel. As a fact the preliminary covering note only speaks of a policy "from Bombay and Salt Ports to Calcutta," and strictly speak-

ing the completed contract between the parties did not cover a policy which included risk of craft and boats to and from the vessel. But this point was not taken by the learned counsel, and the mercantile practice apparently being to issue a policy in the form of Exhibit F on the covering note in the form of Exhibit C, the original contract may be said to have impliedly included the risk of craft and boats to and from the vessel. But it would be obviously unfair to put plaintiff in a better position than if a policy had been issued on 15th March, 1897, on salt "per any B. I. or Asiatic Co.'s steamer or steamers." Such a policy would have been perfectly good: but the plaintiff would have been bound, if possible, to declare the vessel before loss. (Arnould, 6th Edition, pages 337, 338)

No doubt if the preliminary covering note had named the vessel—the S. S. "Nairung"—then the contract would have been complete to that extent also, and as the plaintiff would have been entitled at any time to a policy on salt shipped by the "Nairung" he would have been entitled to recover on the present policy, even though he knew of the loss before the policy was issued. That was exactly the case in *Cory* v. *Patton*(1). The learned Advocate General seeks to put plaintiff in the same position as if the S. S. "Nairung" had been named in the covering note. But that would be obviously unfair. If the principle to be derived from the authorities is that the time between the slip (covering note) and the policy is not to be counted, and the latter relates back to the former (per Bramwell, B., in *Lishman* v. *Northern Maritime Insurance Co.*(2)) then here the policy is for salt shipped on any B. I. or Asiatic Co. steamer or steamers. If plaintiff wanted to insert the name of the vessel in the policy, he should have done so, if possible, before loss; and this was possible. In *Ionides* v. *Pacific Insurance Co.*(3) quoted above, the original slip was on hides "by ship or ships," and the insurer afterwards at the request of the broker initialled a slip on hides by the "Socrates," making no inquiry as to the particular ship proposed, this second slip being expressly made in order to be substituted for the slip "by ship or ships" already mentioned.

(1) (1872) L. R., 7 Q. B., 304. (2) (1875) L. R., 10 C. P., 179, 181.
(3) (1871) L. R., 6 Q. B., 674.

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The policy was accordingly executed. It was held that the jury were justified in finding that, regardless of what might be the name of the ship, the insurer meant to insure the goods at a premium already fixed in the first slip, by the vessel on which the goods were really shipped, which was the "Socotra," the mistake being an innocent one and of no consequence. But another policy answering to an original slip on goods by the "Socotra" was held void by reason of the misrepresentation. It is necessary to bear these facts in mind when considering the remarks above quoted from the judgment of Mr. Justice Blackburn.

If the object of the declaration is to ear-mark and identify the particular adventure to which the assured elects to apply the policy, and so prevent the possible dishonesty of a party insured, then in the present case the plaintiff should have made the declaration as soon as possible and before loss. The same principle was applied in *Harman* v. *Kingston*(c), which was an action on an "open" policy "on sugar and cotton as might be thereafter declared and valued." It was found as a fact that there had been no declaration before loss; and Lord Ellenborough ruled that "where there is an insurance on goods as may be thereafter declared and valued, this gives the assured a power by duly declaring and valuing before the loss to make it a valued policy; but that if the assured do not so declare and value, it is then an open policy, and the interest is matter of evidence at the trial." The present is an action on a valued, not on an open policy. The contract was for a policy on goods on any steamer or steamers of two specified steam-ship companies. If plaintiff wished the risk to attach to the salt on a declared steamer of one of those companies, he should have made the declaration before loss. Similarly in *Robinson* v. *Touray*(d), the action was on an open policy on goods to be thereafter valued and declared by ship or ships; the declaration was duly made, but a blunder was made in the names of the ships first declared. This was found to have been without fraud and without prejudice to the underwriters. The assured, therefore, recovered.

(c) (1811) 3 Camp. 152. (d) (1811) 3 Camp. 158.

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KANJI HAVJI MITHA v. PURSHOTAM POONJA MARFATIA AND COMPANY.

It cannot, in my opinion, be said that there was a mercantile practice between the parties to the present suit, contrary to the principle above indicated. No doubt defendants have in four instances paid for loss occurring between the dates of the slips and of the policies, and in two of these (in 1896) the defendants were not bound to make the payments, if the above principle is correct. It is, however, possible that defendants have now realized their mistake, and there is no reason why they should not be permitted to take their stand on the correct principles of the law of marine insurance. This right is not taken away because plaintiff may have been in the habit, since December, 1893, (when he commenced to insure with defendants) of not taking out his policies till his salt had been shipped on the steamers. The findings on the issues, except as to the covering note being exhausted, will be in favour of the defendants, and the suit must be dismissed with costs.

The plaintiff appealed.

The appeal came on for hearing before Jenkins, C. J., and Tyabji, J.

Macpherson and *Raikes* for appellant.

Scott (Acting Advocate General) and *Lowndes* for respondents.

The authorities referred to were those mentioned in the judgment.

JENKINS, C. J.:—This is an appeal from a decree made by Mr. Justice Candy in a suit brought against the defendants on a policy of insurance issued by them to the plaintiffs on the 30th April, 1897. The facts are fully stated in the judgment of the lower Court and I will mention only those which are material for the purpose of our decision in this appeal.

The plaintiffs are salt merchants and for some years have had marine insurance transactions with the defendants. On the 15th March, 1897, a covering note or 'slip' was issued by the defendants to the plaintiffs in the following form:—

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"THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED.

"Preliminary Covering Note, 3 P M.

"*Bombay, 15th March* 1897.

"To KASAM H. MITHA, Esq.

"DEAR SIR,—We have noted your application in the above company as under, and a stamped policy in completion hereof will be issued on receipt of particulars.

"Amount Rs. 51,000 on salt. Any B. I and for Asiatic steamer or steamers from Bombay and salt ports to Calcutta at ¾ per cent.

"This note will be null and void on departure of the vessel from port of sailing

"*N.B.*—From 25th May to 31st August, both inclusive, risk of boats alongside the vessel between sunset and sunrise is not covered by this acceptance."

Now it will be observed that in this covering note there is no indication given of any particular venture for which the policy is to be granted, or of any specific goods which are to be insured. At the end of March it appears that the plaintiffs did put on board a ship which came within the class of ships mentioned in the note a quantity of salt, but apparently as to that particular shipment no steps were taken by the plaintiffs to bring the covering note into legal operation: at least there is no evidence before us that there were. But on the 14th April, 1897, the plaintiffs put on board the prow "Path" at Uran 301 bags of salt for shipment on board the British India steamer "Nerung." On the 27th April, after forty-nine of the bags had been safely transhipped, a storm came on and the prow sank with the 545 remaining bags on board, and they were wholly lost.

In the usual course a protest setting forth the circumstances of the disaster was made before a Notary Public on the 28th April, and on that day the notarial certificate was obtained.

On the 29th April, 1897, the plaintiffs paid the premium on the policy, and on the next day (the 30th) the policy was stamped and issued. On that day the plaintiffs gave the defendants notice of their claim. It is on these facts that the suit is brought.

In answer to the claim the defendants say that the plaintiffs are not entitled to recover under the policy, because to the plaintiffs' knowledge the goods had already been lost at the date at

which the policy was issued, and that they had concealed this material fact from the defendants. By way of reply to this defence the plaintiffs say (1) that notice of loss was given, and that (2) it is immaterial whether such notice was given or not.

As to the first point, it is a question of fact. The Judge of the lower Court has found that the plaintiffs failed to prove that notice was given. There is a direct conflict of evidence upon the point, and where that is the case, I, sitting in a Court of appeal, would be slow to differ from the Judge who has had the advantage of seeing the witnesses and of observing their demeanor. (His Lordship referred to the evidence and to the probabilities, and continued.—) On the question of fact, then, we concur with Mr. Justice Candy in holding that the plaintiffs have not proved that notice of the loss was given before the policy was effected.

It remains to consider the question of law, *viz.*, whether the fact that the covering note or slip had been issued made it immaterial whether or not the loss was disclosed before the issue of the policy. The plaintiff contends that the slip constituted a complete contract between him and the defendants, which remained unaffected by any circumstances which subsequently occurred. He relies on two cases—*Lowndes* v. *Pacific Insurance Co* [1] and *Cory* v. *Patton* [2]. I do not think these cases apply here. They decide that although a slip cannot be sued on for financial reasons, nevertheless it has the effect that it constitutes the bargain which binds the parties in honour though not in law, and when a policy is subsequently issued in conformity with the slip, then, in an action on the policy, circumstances occurring in the interval between the date of the slip and the policy cannot be pleaded as a defence. The test put in one of these cases is that you must treat a slip as apparently it is treated in America and as it was formerly treated in England before financial legislation dealt with it—as a document on which a suit for specific performance might be brought. Had such a suit been brought on the slip in this case and had a policy been issued in conformity with it, that policy

(1) (1871) L. R., 6 Q. B., 674; S. C. on appeal; (1872) L. R., 7 Q. B., 517.
(2) (1872) L. R., 7 Q. B., 304.

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would have been an open policy of insurance. But if the policy issued in this case had been such a policy, it is conceded that the [illegible] by reason of the non-delivery of the goods. It appears to us that the [illegible] would not be held to be [illegible] and [illegible] his pay [illegible] Railway Board [illegible] which he [illegible].

I think, therefore, that the second point raised for the appellant fails and that the decree of the Lower Court should be affirmed with costs.

TYABJI, J.:—I have considered, on the question of fact, but I do not feel justified in differing on the point from the Judge of the Lower Court. On the question of law I concur in what has been said by the Chief Justice.

Decree affirmed.

Attorneys for appellant (plaintiff):—Messrs. *Bachhar and Bros.*

Attorneys for respondents (defendants):—Messrs. *Crawford, Lynch and Chuni.*

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Chitre.

1899. April 5.

SAYAD ZAIN (ORIGINAL DEFENDANT), APPELLANT, v. KALABHAI LALLUBHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Appeal—Practice—Appeal from a decree in the nature of an award—Case referred to the decision of a Court, both parties agreeing to abide by such decision.

Where both parties to a suit referred the matters in dispute between them to the Court, and agreed to abide by its decision, and the Court passed a decree awarding a certain sum to the plaintiff,

Held that no appeal lay from the decree, the decision of the Court being in the nature of an arbitrator's award.

SECOND appeal from the decision of Ráo Bahádur K. B. Maráthe, First Class Subordinate Judge of Surat.

* Appeal, No. 9 of 1899.

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SAYAD ZAIN v. KARIMJI.

The plaintiff, a pleader, sued to recover Rs. 6,501-2-5, being the amount of fees due to him by the defendant for professional services.

On the 5th September, 1898, before the suit came on for hearing, both parties presented an application to the Subordinate Judge to the following effect:—

"We have decided that the Court should make a settlement of the dispute between us according to Chapter XXXVIII of the Civil Procedure Code; and we will abide by whatever decision the Court may give.

"We have specially decided that the Court shall have full authority to obtain information from the parties in whatever way the Court may think proper, but the parties are not to produce any evidence except documentary records."

On the 6th September, 1898, the Subordinate Judge passed an order, directing the parties to state their objections, if any, on or before 12th September, 1898, why the provisions of Chapter XXXVIII of the Code of Civil Procedure (Act XIV of 1882) should not be strictly followed.

On the 21th September, 1898, the Subordinate Judge, after hearing the parties, passed the following order:—

"The parties refer me to *Raoji Trimbak Nanaika* v. *Govind Vinayak Nagarkar* (1) and out of deference to their wishes I need not go through the formal procedure of rejecting the suit and registering their application as a fresh suit. The defendant should produce, if he has any, the accounts and papers in connection with the matter in dispute within eight days."

On the 25th October, 1898, the Subordinate Judge gave his decision, awarding to the plaintiff Rs. 5,816-11-6 and interest at 6 per cent. amounting to Rs. 3,983-1-7, in all Rs. 9,800.

He passed a decree for this amount.

Against this decision defendant appealed to the High Court.

Scott (with *Manekshah Jehangirshah* and *K. R. Daphtari*) for respondent:— No appeal lies in this case. The parties referred all matters in dispute between them to the decision of the Subordinate Judge. They agreed to abide by his decision. His decision stands on the same footing as an award. No appeal, therefore, lies from his decision—*Raoji Trimbak* v. *Govind Vinayak* (1); *Burgess* v. *Morton* (2).

(1) P. J., 1897, p. 413. (2) (1896) Ap. Ca., 136.

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R. R. Desai for appellant:—The parties expressly referred the case under Chapter XXXVIII of the Code of Civil Procedure (Act XIV of 1882) An appeal lies from a decree passed under that chapter—*Jamnadas* v. *Gordhandas* [1]. The lower Court was wrong in dispensing with the procedure laid down in that chapter. If that procedure had been followed, there could not have been any question as to the defendant's right of appeal. Even taking the lower Court's decision to be in the nature of an arbitrator's award, an appeal lies from a decree based upon an illegal award —*Nandram Daluram* v. *Nemchand* [2]; *Husanauna* v. *Linganna* [3]; *Saturjit* v. *Dulhin* [4].

CANDY, J.:—In this case Mr. Scott for respondent-plaintiff has taken the preliminary objection that no appeal lies, and we think that this objection must prevail. Plaintiff is a pleader who was engaged professionally by defendant in some heavy litigation. At the close of the litigation disputes arose between the present defendant and his pleader, the plaintiff, as to what was really due to the plaintiff according to the terms of remuneration which had been previously agreed upon. Attempts were made to settle the disputes by arbitration, but eventually the plaintiff filed a regular suit (No. 119 of 1896) in the First Class Subordinate Judge's Court, Surat. Before the case had come to a regular hearing, both parties as well as their pleaders signed an application to the Subordinate Judge, dated 5th September, 1898, which ran as follows:—

"We have decided that the Court should make a settlement of the dispute between us according to Chapter XXXVIII of the Civil Procedure Code, and we will abide by whatever decision the Court may give.

"We have specially decided that the Court should have full authority to obtain information from the parties in whatever way the Court may think proper, but the parties are not to produce any evidence except documentary records."

This application was endorsed on 6th September, 1898, by the Subordinate Judge to the effect that among other things Chapter XXXVIII of the Civil Procedure Code required a case stated. He ended his endorsement thus:—

(3) (1894-95) 18 Mad., 423.
(4) (1897) 24 Cal., 469.

"The parties and pleaders are informed as to what procedure is indispensable, and they are called on to state their objections, if any, till Monday the 12th September, 1898."

Then on 24th September, 1898, the Subordinate Judge made the following further endorsement:—

"The parties refer me to *Rao Trimbak Nagarkar* v. *Gopal Vinayak Nagarkar*[1] and out of deference to their wishes I need not go through the formal procedure of rejecting the suit and registering their application as a fresh suit. The defendant should produce, if he has any, the accounts and papers in connection with the matter in dispute within eight days. The plaintiff to behave accordingly."

Subsequently defendant put in a supplementary written statement, and on 25th October, 1898, the Subordinate Judge gave his decision in the form of findings on the issues which had been previously framed, and ordered defendant to pay plaintiff a certain sum.

Against this decision the present appeal was filed by defendant. We think that on the authority of the case quoted by the Subordinate Judge in his endorsement of 24th September, 1898, no appeal lies.

The very mention of that case shows that the parties must have intended that the decision of the Subordinate Judge as arbitrator should be final. In that case, as in this, the parties solemnly agreed by themselves and by their pleaders to abide by the decision of the Court to be made in a particular way. They cannot, therefore, appeal from it. The case of *Jamnadas* v. *Gordhandas*[2] was different. In that case the parties simply agreed that the Court's decision should be arrived at upon certain specified materials and no more; they did not agree to accept that decision as final. Here the parties agreed that they would abide (*manya karave*) by the decision of the Subordinate Judge. The fact that the express provisions of Chapter XXXVIII of the Civil Procedure Code were knowingly disregarded, shows that the proceedings were *extra cursum curiæ*, and thus the judgment of the Subordinate Judge was in the nature of an arbitrator's award, against which an appeal cannot be entertained if the competency of the appellate Court is objected to by the party holding the judgment. (See *Burgess* v. *Morton*[3].)

(1) (1897) P. J. p. 413. (2) P. J., 1896, p. 424.
(3) (1896) A. C., 136.

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The fact that the Subordinate Judge gave his award in the form of a decree will not make it a decree from which a regular appeal can lie. Nor is it necessary for us to express an opinion as to the steps which plaintiff may be advised to take in order to reap the benefits of the judgment which he holds.

We hold that no appeal lies, and dismiss with costs the appeal filed by defendant.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899. *April* 6.

ISAK (ORIGINAL DEFENDANTS No. 2), APPELLANT, *v.* KHATIJA (ORIGINAL PLAINTIFF), RESPONDENT.*

Jurisdiction—Civil Procedure Code (Act XIV of 1882), Sec. 16, proviso, and Sec. 57—Relief to be obtained by personal obedience of defendants—Property situate outside the jurisdiction of the Court in which the suit is filed—Practice—Procedure.

The proviso to section 16 of the Civil Procedure Code (Act XIV of 1882) requires not only that the relief sought should be entirely obtainable through the personal obedience of the defendant, but also that the defendant should reside within the jurisdiction of the Court in which the suit is filed.

Held, therefore, that a suit for the determination of an interest in immoveable property, filed in a Court within the jurisdiction of which the property was not situate, did not lie in that Court, as all the defendants did not reside within the jurisdiction of that Court, even though the relief sought could have been obtained through their personal obedience.

Held, also, that in such a case the Judge ought not to dismiss the suit, but return the plaint to be presented to the proper Court under section 57 of the Civil Procedure Code.

APPEAL from an order passed by M. P. Khareghat, District Judge of Ratnágiri, remanding a suit for retrial by Ráo Bahádur V. V. Vagle, First Class Subordinate Judge.

The plaintiff sued in the Court of the First Class Subordinate Judge of Ratnágiri for a declaration that she was the owner of a thirtieth share of the khoti of the village of Uple, which

* Appeal, No. 2 of 1899 from order.

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was situate within the local jurisdiction of the Subordinate Judge of Rájápur, and to have her name entered in the B Statement, a village record, as such sharer, and to recover the profits of the share, and for a declaration that she was entitled to pass kabuliyats to Government, &c., &c. In her plaint she stated that the suit was filed in the Court at Ratnagiri, because all the defendants resided within its jurisdiction and all the relief sought could be obtained by their personal obedience to the orders of the Court.

The defendants were twenty-six in all, some of them raised issues on the plaintiff's claim and others contested her claim on grounds immaterial for the purpose of this report.

The Subordinate Judge dismissed the suit, holding that he had no jurisdiction to entertain it. The following is an extract from his judgment:—

"It is admitted that the village in dispute, of which Pen is the principal town, is situated within the local jurisdiction of the Rájápur Court. But, apart from the provisions of section 16 of the Civil Procedure Code, the Court has jurisdiction to try suits for land or interest in land only when all the defendants reside within the local limits of its jurisdiction. This rule is laid down in section 17 of the Civil Procedure Code, and the Rájápur Court has not the jurisdiction, because all the defendants do not reside within the local limits of its jurisdiction. This suit cannot be entertained, therefore, unless it is shown that the Rájápur Court has jurisdiction under section 16. The plaintiff's valuation of the suit was considered by this Court, but as all the parties reside within the local jurisdiction of this Court, the relief sought can be properly granted. Though the defendants [illegible] See provisions of the aforesaid section. But, in the present case, the defendants do not reside within the local limits of this Court's jurisdiction. In the next place, all the relief prayed for in this case cannot be enforced by the Court through the personal obedience of the defendants. It is evident that the determination of the plaintiff's share in the village [illegible] principal defendants others depend, and this is a relief which cannot be entirely obtained through the defendants' personal obedience. The plaintiff would contend that the entry of the plaintiff's name as a sharer in B register was the principal relief and that the main object of this suit was to compel the defendants to give their consent to that entry. But, in the first place, the prayer is not so worded and, in the second place, no entry of the plaintiff's name in B register can be effected, nor the defendants be compelled to give their consent to that entry, unless and until the plaintiff succeeds in establishing her right or share which is denied by the principal contending defendants. In any view, the determination of the plaintiff's right to share in the village is the principal relief sought in this case, and this relief cannot surely be obtained through the

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personal obedience of the defendants. I am, therefore, of opinion that neither the proviso nor the decision at I. L. R, 19 Bom., 43 (*Bhikaji* v. *Pandu*) relied upon by the plaintiff is applicable to this case. It is true that in this case the defendants do not take any objection to this Court's jurisdiction—nay, they actually waive their objection. But mere consent of parties cannot clothe this Court with jurisdiction which it does not possess."

On appeal by the plaintiff the Judge reversed the decree and remanded the case for trial on the merits. In his judgment he said:—

"No doubt the village of Uple although in the Ratnágiri táluka for revenue purposes is within the jurisdiction of the Subordinate Judge of Rajápur. But I think in this case the relief sought can be entirely obtained by the personal obedience of the defendants, and, therefore, the suit falls within the proviso to section 16. Some of the defendants objected to the entry of the plaintiff's name in the revenue registers as a co sharer, and that is why plaintiff has had to file this suit. She asks for a declaration that she is entitled to get her name so entered. She further asks the Court to fix the order in which the co sharers are to manage the village and an injunction against defendants not to obstruct her when she manages in her turn. None of these reliefs require anything to be done by the Court at the village."

Defendant No. 2 preferred a second appeal.

Manekshah J. Taleyarkhan appeared for the appellant (defendant No. 2):—The District Judge is wrong in holding that the Court at Ratnágiri has jurisdiction. The property in suit is situate within the jurisdiction of the Court at Rájápur and the suit should have been brought there—Civil Procedure Code (Act XIV of 1882), section 16. The plaint states that all the defendants reside within jurisdiction of the Subordinate Judge of Ratnágiri. But the first Court has found that allegation to be incorrect and that all the defendants do not reside within its jurisdiction. The record shows that one of the defendants lives at Thána, some others at Jaitápur and a third at some other place. All these circumstances show that the Subordinate Judge of Ratnágiri had no jurisdiction to entertain the suit—*Keshav* v. *Vinayak* [1].

There was no appearance for the respondent (plaintiff).

PARSONS, C. J. (ACTING):—This suit was one for the determination of an interest in immoveable property, namely, the $\frac{1}{20}$th

(1) (1877) 2 Bom., 22.

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share in the village of Uple which was situated within the local limits of the Rajápur Court. It was, however, filed in the Ratnágiri Court, and the District Judge considered that the latter Court had jurisdiction, because the relief sought could be entirely obtained by the personal obedience of the defendants, and that, therefore, the suit came within the proviso to section 16 of the Civil Procedure Code (Act XIV of 1882). He seems, however, to have quite overlooked the fact that this proviso also requires that the defendant, through whose personal obedience the relief sought could be obtained, should reside within the jurisdiction of the Court in which the suit was filed. In the present case the Subordinate Judge of Ratnágiri says that all the defendants do not reside within the local limits of the jurisdiction of his Court; the proviso, therefore, will not apply even if we assume that the District Judge was right in his opinion that the relief sought could be obtained through their personal obedience. We must reverse the order of the District Judge.

The Subordinate Judge ought not to have dismissed the suit, but returned the plaint to be presented to the proper Court under section 57 of the Code. For this reason we reverse his order of dismissal also, and direct him to return the plaint with the proper endorsement. The plaintiff must bear the costs of the defendants throughout.

Orders reversed.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899.
April 6.

PARSHOTAM MANJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANESH VINAYAK AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Execution—Sale in execution subject to mortgage—Suit to set aside sale and for re-sale of property free from mortgage—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), Sec. 287.

The plaintiff, having sold property in execution of a decree subject to a certain mortgage lien which had been duly investigated and allowed, brought this suit to have the sale set aside and praying for a re-sale of the property free from the mortgage lien.

* Second Appeal, No. 632 of 1898.

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Held, that he was not entitled to the relief sought. His proper remedy was to have brought a suit for a declaration that the alleged mortgage was null and void, and to have stayed the sale till the determination of that suit.

SECOND appeal from M. B. Tyabji, District Judge of Thána.

The plaintiff as assignee of a decree attached certain property in execution and applied to have it sold. The first defendant thereupon intervened and claimed to have a mortgage lien upon it. On inquiry his claim was allowed and was ordered to be entered in the proclamation of sale. The property was sold subject to this encumbrance and was bought by the second defendant.

The plaintiff brought this suit praying that the sale should be set aside and that the property should be re-sold free from the first defendant's mortgage. The lower Courts dismissed the suit. The plaintiff appealed to the High Court.

Manekshah J. Taleyarkhan for the appellant (plaintiff).

Narayan V. Gokhale for the respondents (defendants).

PARSONS, C. J. (ACTING):—We think that the lower Courts have correctly held that this suit will not lie. The facts are these. The plaintiff as the assignee of the decree-holder attached certain property and asked for its sale. The defendant No. 1 came forward in response to notices issued in accordance with the rules framed under section 287 of the Civil Procedure Code, and claimed a mortgage lien over the property. His claim was enquired into and was found proved, and was ordered to be entered in the proclamation of sale, and, though the plaintiff took the matter up to this Court, he failed to get the order set aside. The encumbrance accordingly remained notified in the proclamation of sale, and the property was sold and purchased by the defendant No. 2.

The plaintiff has brought this suit to have the sale set aside and a re-sale ordered of the property freed from the alleged encumbrance. We think that he is not entitled to this relief. We know of no authority which allows of a decree-holder selling property twice over on his own application where there has been no irregularity in publishing or conducting it, and no default committed on the part of the purchaser. His proper remedy in the first instance was to have brought a suit for a declaration that the alleged mortgage was null and void, and to have stayed

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the sale till the determination of that suit. Instead of that he caused the sale to be held under the proclamation which contained the encumbrance, and that sale has been confirmed by the Court. No fraud is alleged on the part of the defendant No. 2, on the contrary his action has been held by the lower Courts to have been throughout *bonâ fide*. He cannot, therefore, now be deprived of what he has bought. Possibly, if the mortgage is non-existent, the plaintiff might have a remedy against the defendant No. 1 in the form of an action for slander of title, but that is quite different to what he asks for in the present suit. We confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade

BALVANTRAO (ORIGINAL PLAINTIFF), APPLICANT *v.* F. L. SPROTT (ORIGINAL DEFENDANT), OPPONENT.*

1899. *April* 10.

Mámlatdár's Court—Jurisdiction of Mámlatdár over officers of Government sued in their official capacity—Act XIV of 1869, *Sec.* 32—*Act X of* 1876, *Sec.* 15—*Bombay Irrigation Act* (*Bom. VII of* 1879), *Sec.* 1°—*Leakage water—Rights of riparian proprietors—Water-course.*

A Mámlatdár has jurisdiction, under Bombay Act III of 1876, to hear and determine a suit brought against officers of Government for acts purporting to have been done by them in their official capacity.

The Irrigation Department has no power, under Bombay Act VII of 1879, to dam a stream or a water-course on the ground that it derives its supply of water by leakage from an irrigation canal. Section 48 of the Act only gives the Department the special right of charging a water-rate on land which derives benefit from the leakage.

Water which has leaked from a canal into the land of another person does not belong to the Irrigation Department, so as to give the latter the right to follow it up and claim it as their own.

If the leakage flow was such that it itself had become, in the eye of the law, a canal or water-course, then the rights of the persons through whose lands it flowed would be governed by the law applicable to canals or water-courses.

A Mámlatdár has no power to inquire into matters not covered by the issues laid down by the Act itself.

* Application, No. 287 of 1898.

1899.

BALVANTRAO v. PROTT.

APPLICATION under section 622 of the Code of Civil Procedure (Act XIV of 1882).

Suit for an injunction.

Plaintiff was the owner of certain land (Survey No. 13) at the village of Loni, through which a stream of water flowed.

In 1893 the Irrigation Department sought to levy leakage rates on the plaintiff's land (Survey No. 13), alleging that the water of the stream was derived by leakage and percolation from a certain canal called the Mula Mutha Canal. Plaintiff resisted this levy, contending that the water of the stream was natural spring water and not canal leakage water.

While this matter was under the consideration of Government, a neighbouring owner of land (Survey No. 17) at the suggestion of the irrigation officers erected a dam across the stream so as to prevent the stream flowing down to plaintiff's land (Survey No. 13).

Thereupon plaintiff sued the owner of Survey No. 17 in the Mámlatdár's Court and obtained an order directing the dam to be removed and plaintiff's use of the stream to be restored.

Under this order the dam was removed by the village officers on 4th June, 1897.

On the 8th June, 1897, the irrigation officers re-erected the dam in Survey No. 17 which had been removed in execution of the Mámlatdár's order, and again prevented the water of the stream from flowing on to plaintiff's field.

Thereupon plaintiff filed the present suit in the Mámlatdár's Court, praying for an injunction against the Executive Engineer for Irrigation at Poona and three of his subordinates.

The defendants pleaded (*inter alia*) that under section 32 of Act XIV of 1869 as amended by section 15 of Act X of 1876, the Mámlatdár's Court had no jurisdiction to try a suit brought against officers of Government for acts done by them in their official capacity, and that the plaintiff had no right to sue.

The Mámlatdár held that he had jurisdiction to take cognizance of the suit against officers of Government. He further held, however, that as the water of the nála was canal leakage water, the Irrigation Department had a right to erect the dam and to give the sole

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use of the water to the occupant of Survey No. 17. He, therefore, dismissed the plaintiff's suit.

Against this decision plaintiff applied to the High Court under its revisional jurisdiction.

Branson (with him *Ganpat Sadashiv Rao*) for applicant:—The Mámlatdár was wrong in discussing the title to the water of the nála. His finding that the water of the nála is canal leakage water is beside the question. Even assuming that it is leakage water, that does not empower the Irrigation Department to stop the flow of the water to plaintiff's land. Under section 48 of Bombay Act VII of 1879 the irrigation authorities can only levy leakage rates, if the requirements of the section are fulfilled; but they cannot dam up the stream, and obstruct the plaintiff's user of the water. The Mámlatdár has no authority to inquire into the legality of the obstruction caused—*Ganesh* v. *Ramchandra*[1]. The only issues he has to try are those specified in section 15 of the Mámlatdárs' Courts Act (Bombay Act III of 1876). He was bound to find whether or not the obstruction we complained of was caused by defendant within six months before suit. But he has not done so. His decision is, therefore, illegal. The pleadings of the parties show that the issues laid down in the Act must be decided in plaintiff's favour.

Ráo Bahádur *Vasudev J. Kirtikar*, Government Pleader, for opponent:—The Mámlatdár's Court has no jurisdiction over officers of Government for acts done, or purporting to have been done, by them in their official capacity. Section 32 of Act XIV of 1869, as amended by section 15 of Act X of 1876, shows that the Court of a District Judge is the only Court which can have and determine a suit against officers of Government. If a Subordinate Judge or a Court of Small Causes has no jurisdiction over them, *a fortiori* a Mámlatdár's Court cannot have any. On the merits, the Mámlatdár has found that the water of the nála is canal leakage water. The defendant No. 1, who is a canal officer, also says in his evidence that the water is leakage water. His opinion on this point is final and conclusive under section 48 of Bombay Act VII of 1879—*Balvant G. Oze* v. *Secretary of State for India*[2]. The water being canal leakage water, the irrigation

(1) P. J., 1891, p. 96. (2) (1896) 22 Bom., 377.

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officers have the power under the Act to regulate the supply of such water in such manner as they think fit. See sections 8, 16, 22 of the Act. For this purpose it is open to them to erect a dam across a water-course. And if they erect one, they do no wrong for which an action will lie.

PARSONS, J.:- The first point raised in this application is, whether a Mámlatdár's Court has jurisdiction under the Act of 1876 to hear and determine a suit brought against officers of Government for acts purporting to have been done by them in their official capacity.

The facts are these:--There is a nála or water-course which rises in the hill to the south of Loni. It runs through several fields, among them Survey No. 17 and Survey No. 13 (which latter field is next to Survey No. 17 and belongs to the plaintiff) and ultimately discharges into the Mutha Mula river. The irrigation canal is carried over it by a bridge at a spot which is over a mile distant from Survey No. 13. The owner of Survey No. 17 in 1897 built a dam across the nála thus preventing the flow of any water into the plaintiff's field; for this the plaintiff sued him in the Mámlatdár's Court and obtained an injunction, under which the dam was destroyed. A few days afterwards the dam was rebuilt by, and by order of, the defendants, who are the Executive Engineer for Irrigation at Poona and three of his subordinates, and the plaintiff has brought the present suit in the same Court to obtain against them the same relief.

The Mámlatdár held that he had jurisdiction, and we think that in this he is right. His Court is a Civil Court; the only enactment cited to us as restrictive of the powers of Civil Courts in their jurisdiction over persons is section 32 of the Bombay Civil Courts' Act, 1869, but it mentions Subordinate Judges and Courts of Small Causes only, and the Court of a Mámlatdár is neither of these.

The next point relates to the legality of the order of the Mámlatdár dismissing the suit, and as to this there can be no doubt that the Mámlatdár has been hopelessly wrong. He framed the proper issues, but instead of deciding as to the possession or enjoyment of the use claimed, he entered upon a long

discussion into the title to the water in the nála and came to the conclusion that it was not natural water but canal leakage water and, as such, he says, the Irrigation Department had a perfect right to utilize it in the most advantageous manner, and to dam it up when and where they pleased, and to give the sole use of it to the occupant of Survey No. 17. The fact that he thus tried a question of title and declined jurisdiction because he found that the water belonged to the Irrigation Department and not to the plaintiff, without any enquiry into the question of possession or enjoyment, would oblige us to reverse his order and remand the suit for retrial; but we think it necessary here to add a few words as to the nature of the title thus set up for the defendants by the Mámlatdár, for that it was set up by the Mámlatdár and not by the defendants is clear from the pleadings. Water which has leaked from a canal into the land of other persons would not belong to the Irrigation Department, so that the latter would have the right to follow it up and claim it as their own. Ordinarily it would belong to the owner of the soil, and the Act only gives the department the special right of charging a water-rate on the land which derives benefit from the leakage (see section 18 of the Bombay Irrigation Act, 1879). If the leakage flow was such that it itself had become in the eye of the law a canal or water-course, then the rights of the persons through whose lands it flowed would be governed by the law applicable to canals or water-courses. In the present case, the leakage flow, if any, was into an admittedly pre-existing water-course, and, therefore, the law applicable to the case is that which would be applicable to that water-course.

The Mámlatdár, however, has nothing whatever to do with the law of the case; all he has to do is to determine three simple issues of fact. Admittedly there is a water-course and there is a flow of water down that water-course, the use of which the plaintiff claims. What, therefore, the Mámlatdár has to determine is, (1) whether the plaintiff is actually in possession or enjoyment of the property or use claimed, (2) whether the defendants are disturbing or obstructing or have attempted to disturb or obstruct him in such possession or enjoyment, (3) whether such disturbance or obstruction or such attempted disturbance or obstruction

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officers have the power under the Act to regulate the supply of such water in such manner as they think fit. See sections 8, 16, 22 of the Act. For this purpose it is open to them to erect a dam across a water-course. And if they erect one, they do no wrong for which an action will lie.

PARSONS, J.: The first point raised in this application is, whether a Mámlatdár's Court has jurisdiction under the Act of 1876 to hear and determine a suit brought against officers of Government for acts purporting to have been done by them in their official capacity.

The facts are these:—There is a nála or water-course which rises in the hill to the south of Loni. It runs through several fields, among them Survey No. 17 and Survey No. 13 (which latter field is next to Survey No. 17 and belongs to the plaintiff) and ultimately discharges into the Mutha Mula river. The irrigation canal is carried over it by a bridge at a spot which is over a mile distant from Survey No. 13. The owner of Survey No. 17 in 1897 built a dam across the nála thus preventing the flow of any water into the plaintiff's field; for this the plaintiff sued him in the Mámlatdár's Court and obtained an injunction, under which the dam was destroyed. A few days afterwards the dam was rebuilt by, and by order of, the defendants, who are the Executive Engineer for Irrigation at Poona and three of his subordinates, and the plaintiff has brought the present suit in the same Court to obtain against them the same relief.

The Mámlatdár held that he had jurisdiction, and we think that in this he is right. His Court is a Civil Court: the only enactment cited to us as restrictive of the powers of Civil Courts in their jurisdiction over persons is section 32 of the Bombay Civil Courts' Act, 1869, but it mentions Subordinate Judges and Courts of Small Causes only, and the Court of a Mámlatdár is neither of these.

The next point relates to the legality of the order of the Mámlatdár dismissing the suit, and as to this there can be no doubt that the Mámlatdár has been hopelessly wrong. He framed the proper issues, but instead of deciding as to the possession or enjoyment of the use claimed, he entered upon a long

discussion into the title to the water in the nála and came to the conclusion that it was not natural water but canal leakage water and, as such, he says, the Irrigation Department had a perfect right to utilize it in the most advantageous manner, and to dam it up when and where they pleased, and to give the sole use of it to the occupant of Survey No. 17. The fact, that he thus tried a question of title and declined jurisdiction because he found that the water belonged to the Irrigation Department and not to the plaintiff, without any enquiry into the question of possession or enjoyment, would oblige us to reverse his order and remand the suit for retrial, but we think it necessary here to add a few words as to the nature of the title thus set up for the defendants by the Mámlatdár, for that it was set up by the Mámlatdár and not by the defendants is clear from the pleadings. Water which has leaked from a canal into the land of other persons would not belong to the Irrigation Department, so that the latter would have the right to follow it up and claim it as their own. Ordinarily it would belong to the owner of the soil, and the Act only gives the department the special right of charging a water-rate on the land which derives benefit from the leakage (see section 18 of the Bombay Irrigation Act, 1879). If the leakage flow was such that it itself had become in the eye of the law a canal or water-course, then the rights of the persons through whose lands it flowed would be governed by the law applicable to canals or water-courses. In the present case, the leakage flow, if any, was into an admittedly pre-existing water-course, and, therefore, the law applicable to the case is that which would be applicable to that water-course.

The Mámlatdár, however, has nothing whatever to do with the law of the case; all he has to do is to determine three simple issues of fact. Admittedly there is a water-course and there is a flow of water down that water-course, the use of which the plaintiff claims. What, therefore, the Mámlatdár has to determine is, (1) whether the plaintiff is actually in possession or enjoyment of the property or use claimed, (2) whether the defendants are disturbing or obstructing or have attempted to disturb or obstruct him in such possession or enjoyment, (3) whether such disturbance or obstruction or such attempted disturbance or obstruction

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first commenced within six months before the suit was filed; and to pass a decree according to his findings thereon.

We reverse his present order and remand the case for a decision on the merits. All costs to be costs in the cause.

RANADE, J.:—In this case the applicant, who was plaintiff in the Mámlatdár's Court, had obtained a decree against one Javeri for the removal of a dam which had been constructed by the latter in his own (Survey No. 17) so as to obstruct the flow of a water-course into plaintiff's land (Survey No. 13) This decree was obtained on 3rd June, 1897, and was executed by the removal of the dam. Within a day or two after, the present defendants, who are respectively (Irrigation) Executive Engineer and his subordinates, set up the dam, and obstructed the flow of water into plaintiff's Survey No. 13, and thereupon plaintiff applied under the Mámlatdárs' Act for an injunction to restrain the defendants from obstructing the flow of water into his land. The question of jurisdiction was raised before the Mámlatdár, but he overruled the objection. On the merits, the Mámlatdár held that the stream received its water-supply from the leakage of canal water, and not from any independent source, and that as the Irrigation Department had a right to control their leakage supply, it cannot be said that plaintiff had ever possession or enjoyment of this water, and there was thus no disturbance of that possession. The claim for injunction was therefore rejected by the Mámlatdár.

The applicant seeks the revision of this decree on the ground that the Mámlatdár had no authority under the Act to inquire into any other question save that of possession and obstruction, and that his inquiry into the source of the supply was *ultra vires*. The Government Pleader, who appeared to support the decree, raised a preliminary question about the jurisdiction of the Mámlatdár's Court to entertain the suit, and he also urged that the decree was right on the merits.

It will be convenient to consider the question of jurisdiction in the first instance. It is admitted that the Mámlatdárs' Act is silent on the point, and contains no limitation as regards the parties to possessory suits over which these Courts have jurisdic-

tion. Section 10 of the Act directs the Mámlatdár to return the plaint if the subject of the plaint is not within his jurisdiction. It is, however, contended that as under section 32 of Act XIV of 1869 as amended by section 15 of Act X of 1876, the Subordinate Judges cannot receive or register a suit in which the Government or any officer of Government is a party in his official capacity; the same restriction should obtain in the case of Mámlatdárs' Courts, where, as in the present suit, officers of Government are defendants. It may be argued, on the other hand, that questions of jurisdiction cannot be properly decided on grounds of presumption or analogy. Though under section 32 of Act XIV of 1869, the Subordinate Judges' Courts had no jusisdiction over Sirdárs who could only be sued in the Agents' Courts, these latter were subject to the jurisdiction of Small Cause Courts in the Mofussil until the Act of 1887 was passed into law. Similarly, Courts of Small Causes were not subject to the same limitations as those which bound the Subordinate Judges' Courts till section 15 of the Revenue Jurisdiction Act was amended. It was only this section which included Small Cause Courts with Subordinate Judges' Courts as being subject to this restriction of their powers in suits to which Government or an officer of Government acting in his official capacity is a party. The Mámlatdár had, therefore, jurisdiction to entertain this suit. It is further clear also that the provisions of section 424 of the Civil Procedure Code have no application in respect of the acts of public officers which could not possibly be said to have been done by them in their official capacity. On the whole I feel satisfied that the Mámlatdárs' Court had jurisdiction to entertain this suit, though irrigation officers were defendants.

We have next to consider the decision on the merits. I feel satisfied that the Mámlatdár has gone out of his way in considering the question of the source of water-supply, and basing his conclusion on the view he took of that source of supply. The Act itself lays down the issues that must be considered in such suits, and all matters not covered by these issues are extraneous, and ought not to influence the decision either way. It is admitted that plaintiff had obtained a decree against Javeri, and that decree was executed. The irrigation officers, who are parties

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to this suit, in a day or two after re set up the dam; and this action was sought to be justified on the ground that they had power to do so under section 48 of the Irrigation Act. That section, however, empowers canal officers only to charge a water-rate on lands which in their opinion receive a supply from percolation or leakage or surface flow. It did not empower the defendants to act in open defiance of the authority of the Mámlatdár's Court, and set at naught the decree of that Court.

The only issues the Mámlatdár had to consider were, whether the plaintiff was in possession, whether defendants obstructed or disturbed that possession, and, lastly whether this disturbance was within six months before suit—*Basapa* v. *Lalshmapa*[1]. The pleadings of the parties made it clear that these points must be disposed of in plaintiff's favour. The plea of justification set up on the ground of the source of the water-supply being leakage from the canal was not a point which could be pleaded in the Mámlatdár's Court—*Ganesh* v. *Ramchandra*[2]—and the Mámlatdár was in error in entering upon this inquiry, and basing his decision on the result of the conflicting evidence offered on that point. The opinion of the Collector Mr. Ommanney was apparently in favour of the view that the stream had an independent source of supply. Justification and title other than that of possession within six months could only be pleaded in a properly instituted suit in a Civil Court. This is not a case where the discretion about the non-interference of this Court can be exercised with advantage as was the case in *Rakhma* v. *Tulaji*[3] and *Nathekha* v. *Abdul Alli*[4]. I would, therefore, set aside the Mámlatdár's order, and send back the case to him for a proper and legal order.

Order reversed and case sent back.

(1) (1877), 1 Bom., 624.
(2) P. J. for 1891, p. 96.
(3) (1891), 19 Bom., 675.
(4) (1893), 18 Bom., 449

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Crowe.

RAGHUNATHRAO (ORIGINAL PLAINTIFF), APPELLANT, v. VASUDEV AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS.*

Khoti—Khoti khasgi lands—Khasgi lands allotted to khoti shares—Right of khoti—Occupancy rights in khoti khasgi land.

One Naro was the owner of a 11 pies takshim (share) in a khoti village. To this takshim were allotted twenty khasgi thikans. In 1870 Naro mortgaged his khoti takshim to the plaintiff.

In 1880 the takshim was sold in execution of a decree against Naro and purchased by Ambardekar. Ambardekar sold the takshim to the plaintiff in 1881.

In 1893 plaintiff obtained a decree against Naro establishing his right to recover thal (or customary rent) in respect of the twenty khasgi thikans.

Naro having died, plaintiff brought this suit against Naro's sons in 1895 to eject them from the khasgi thikans.

Held that the plaintiff was entitled to recover. The sale of the khoti takshim passed with it the khasgi lands allotted to the takshim. Both the mortgage and purchase of the takshim plaintiff acquired title to the khasgi thikans in dispute.

Held, also, that the effect of the decree which plaintiff had obtained against Naro in 1893 in the rent suit was that, in the absence of an agreement, Naro was a mere tenant at will of the khasgi hikans, liable to be evicted on due notice.

Held, also, that a khoti sharer has not, with reference to a khoti khasgi thikán allotted to his share, an "occupancy right" against the body of khoti sharers, so that when he puts with his share in the khoti his khoti khasgi lands are changed into khoti nishat lands.

SECOND appeal from the decision of M. P. Kharegat, District Judge of Ratnágiri.

Suit in ejectment. One Naro (the father of defendants Nos. 1, 2 and 3) and his brother Balaji were owners of a 11 pies takshim (or share) in the khoti village of Nive Budruk to which certain khoti khásgi lands were attached. No formal partition of the khoti had been made, but the sharers for mutual convenience had allotted to each share a part of the khásgi lands, and twenty thikáns of these lands had fallen to the share held by Naro and Balaji.

* Second Appeal, No. 412 of 1898.

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In 1876 Naro for himself and his brother mortgaged the whole of his khoti takshim to the plaintiff.

In 1879 Naro sold four out of twenty thikáns of the khásgi land to one Vishvanath.

In 1880 the share (or takshim) of the khoti village belonging to Naro and Balaji was sold in execution of a decree obtained against them by one Krishnaji Lakshman, and purchased by Ambardekar, and in 1881 Ambardekar sold it to the plaintiff.

In 1889 plaintiff filed suits both against Naro (owner of sixteen thikáns) and against Vishvanath (owner of four) to recover thal (rent) of the twenty khásgi thikáns. The Subordinate Judge held that by reason of the Court sale of the khoti takshim Naro had lost his *status* as a khot and had been reduced to the position of an ordinary tenant-at-will in a khoti village, liable to pay thal to the plaintiff as khot according to the custom of the country.

This decision was eventually upheld in appeal by the High Court in 1893 (*Rav Raje Sir Dinkarrav* v. *Narayan*)[1].

Subsequently to this decision, Vishvanath re-sold the four thikáns of khásgi land to Naro.

Naro having died, plaintiff filed the present suit in 1895 to eject Naro's sons (defendants Nos. 1, 2 and 3) and their tenants, defendants Nos. 4 and 5) from the twenty khásgi thikáns, after giving them notice to quit.

Defendants pleaded (*inter alia*) that the plaintiff had not acquired any title to these khásgi thikáns either under his mortgage or by his purchase at the Court sale; that the khásgi thikáns were not comprised or included in the khoti takshim, and that the defendants were occupancy tenants of the thikáns, and as such were not liable to be evicted so long as they paid the fixed rent.

The Subordinate Judge held that the khásgi thikáns in dispute were part and parcel of the khoti takshim, and that consequently when the khoti takshim was sold, they passed with it; that the plaintiff had become owner of the thikáns by right of purchase; that the defendants were not occupancy tenants, and were liable

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to be ejected after notice to quit. He, therefore, awarded the plaintiff's claim.

The decision was reversed, on appeal, by the District Judge, and the suit was dismissed with costs.

The following extract from the District Judge's judgment gives his reasons :—

"(2) On the second point I hold that the plaintiff has only acquired the right of the khot, *i.e.*, the right to levy rent on the khásgi lands of defendants Nos. 1 to 3, and not the right of occupancy which has remained with them. The khoti takshim was mortgaged to the plaintiff in 1876 under Exhibit 46; that khoti takshim was sold through the Court in execution of the mortgage decree of one Krishnaji Lakshman on 4th June, 1880, and purchased by one Ambardekar (see sale-certificate, Exhibit 52), and conveyed by him to plaintiff on 27th April, 1881, under the sale-deed, Exhibit 51. In none of these documents is there a word about the khásgi lands; they only deal with the khoti takshim. The Subordinate Judge considers that the khásgi lands are an inseparable appanage of the khoti, and so when the khoti is sold, the khásgi passes with it. I entirely differ from him on this point. The khásgi lands are not inseparable from the khoti; they are very frequently dealt with separately. The khásgi lands do not generally pass when the khoti alone is transferred. During my three years' experience of this district I have seen a large number of documents dealing with khoti takshims as well as khásgi lands, and, as a rule, I have seen that whenever the khoti alone is mentioned, and the khásgi lands are not expressly mentioned, they do not pass. No doubt, instances can be quoted to the contrary, but they are rare. I would, therefore, lay the burden of proof upon the party who asserts that in any particular case khásgi lands passed without explicit mention with the khoti. To show that such has been the experience of other officers also, I may quote the report of Captain Wingate (on page 245 of the 'Ratnágiri Gazetteer'). According to him, 'in mortgage-deeds executed by the khot, the mortgage referred to the rents and profits of the village, never to the ownership of a definite plot of land, and when a khot mortgaged special pieces of land, it was as his private property, not as a part of the hereditary khotship.' This is but natural, considering that the occupancy right of khásgi lands has little in common with the rights of a khot as such, which are generally those of management and levy of rent. that khásgi lands may have been acquired quite apart from the khoti either by hereditary possession before the acquisition of the khoti or by transfer from occupancy tenants after the acquisition of the khoti."

Against this decision plaintiff preferred a second appeal to the High Court.

M. R. Bodas for appellant :—The plaintiff is entitled to the khásgi thikáns both under his mortgage and by rights of purchase.

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The mortgage-deed not only refers to the khot's right to levy rent on the khásgi lands, but also to all lands possessed by the khot at the time. The khasgi lands are part and parcel of the khoti, and as such are included both expressly and by implication in the property mortgaged to plaintiff. The sale of the khoti takshim carried with it the khásgi lands, and the purchaser at the Court sale acquired a complete title to the khásgi lands—*Govindrav* v. *Ravji*[1]. After the sale, Naro ceased to be a khot, and sank to the position of an ordinary tenant-at-will of the khásgi lands. The lower Court erred in holding that Naro had occupancy rights in the khásgi lands. A khot is not, and cannot be, an occupancy tenant of such lands. The previous litigation shows that Naro was not an occupancy tenant, but a mere tenant-at-will of the lands. The matter is *res judicata*. The defendants being tenants-at-will are liable to be ejected after notice to quit.

M. V. Bhat for respondents (defendants):—The lower Court has found that Naro had no intention to part with the khásgi lands, and that this was the intention of both parties to the mortgage transaction. This is a finding of fact and cannot be disturbed in second appeal. This case falls within the principle laid down in *M. Lucas* v. *Kashinath*[2]. What was mortgaged was simply the khot's right to levy rent on the khásgi lands which are the absolute and private property of the khot. It was never contemplated that the mortgagee should include the khot's right over these lands. Suppose the khoti is abolished or attached under section 27 of the Khoti Act, the khot's right of occupancy in his khásgi lands will not be affected at all. In respect of the khásgi lands, the khot is himself the khatedár kul and pays rent to himself as khot. As to the nature of khoti khásgi lands, see *In re Antaji Keshav Teak*[3] and *Secretary of State for India* v. *Sitaram*[4]. The right to hold the khásgi lands on payment of the customary rent is vested in defendants.

CANDY, J.:—The principal question in this case is whether the plaintiff, who is the purchaser of the 14 pies takshim of the defendants Nos. 1 to 3 in the khoti of the village of Nive Budrúk, is entitled after due notice to eject those defendants from certain

(1) (1893) P. J. p. 59.
(2) (1888) P. J. p. 358.
(3) (1893) 18 Bom., 670.
(4) (1899) *ante* p. 619.

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Mention was made above of the decision of the Settlement Officer in 1888 that Naro and Balaji and Vishwanath were "occupancy tenants" of the khoti khásgi thikáns, and as such liable to pay makta only. But the decision of the High Court in 1893, alluded to above, clearly reversed the decision of the Settlement Officer as to status, and the reversal of the decision as to rent followed as a matter of course (*cf.* the ruling of the Full Bench in *Antaji* v. *Antaji* [1]).

The only remaining question is as to the rights of the other defendants in these thikáns. The District Judge concurred with the Subordinate Judge in holding that these rights do not affect the plaintiff's claim: and we see no reason for differing from that view.

For the above reasons we must reverse the decision of the District Judge and restore that of the Subordinate Judge. Defendants Nos. 1 to 3 will bear plaintiff's costs throughout as well as their own. The other defendants will bear their own costs throughout.

Decree reversed.

(1) (1896) 21 Bom., 180.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

SIDHESVAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* BABAJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1899. *June* 12,

Mortgage—Suit for sale of mortgaged property—Regulation V of 1827, *Sec.* 15, *Cl.* 3—*Special agreement—Limitation.*

Plaintiff brought this suit in 1895 on a mortgage-bond, dated 1870, to recover the balance due on the mortgage by sale of the mortgaged property, or, in the alternative, for possession of the property until payment of the balance. The mortgage contained a stipulation that, on default of payment of interest by the mortgagor, the mortgagee should take possession and hold possession in lieu of interest, and that such possession should continue until the mortgagor paid the principal and interest that remained unpaid when the mortgagee took possession.

The Judge dismissed the suit, holding that the claim for possession was time-barred, and the claim for the sale of the property could not be enforced, as the

* Appeal, No. 92 of 1898.

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mortgage-bond contained a special agreement which took the case out of clause (3) of section 15 of Regulation V of 1827.

On appeal, *held*, reversing the decree, that section 15 of Regulation V of 1827 was not applicable, as the mortgagee never was in possession, and that the claim to enforce the mortgage security by sale was not barred.

APPEAL from the decision of E. M. Platt, District Judge of Sholápur.

The plaintiff Sidhesvar, a minor represented by his next friend, the Collector of Sholápur, brought this suit in 1895, to recover Rs. 1,080, the balance due on a mortgage bond executed on the 17th June, 1870, by the deceased defendant Babaji bin Pirgji to his (plaintiff's) deceased uncle Krishnapa for Rs. 540 by sale of the mortgaged property, praying, in the alternative, for possession of the property until payment of the balance due. The following is the translation of the mortgage-bond sued on:—

"Mortgage-bond (passed) to Krishnappa bin Mahadappa Hagre, Lingáyat Váni, * * by Babaji valad Pirgji Patil * occupation agriculturist, in Fasli year 1280, the mortgage deed written as follows:—

"The former debt due to you from us is Rs. 540, (on this) we shall pay interest at one rupee per cent. per mensem, and the following ancestral property of ours is (given) in mortgage"

(Particulars of the property)

"The aforesaid ancestral property has been in our possession from before and had been mortgaged by a registered mortgage-bond dated the 17th October, 1866. An account is now made of all former dealings, and this mortgage has been effected as security for the said rupees, but the management (*vahivat*) of the lands shall be with ourselves, we shall derive income therefrom and pay your interest every year in the month of Chaitra, and if in any year you do not receive your interest from us, at that same time we shall put you in possession of the mortgaged property; thereafter you should pay the Government assessment and enjoy the profits in lieu of interest. Thereafter we shall resume possession, (only) after the crops of the year have been removed, when we shall pay the principal debt and the arrears of interest due before your being put in possession. Till then we shall have no claim to these lands. We shall take receipts for payments of the *vasul*. This mortgage bond has been executed of our own free will and accord. Dated Jeshta Vadya 4th, 1792 17th June 1870."

Bapu, the son of the mortgagor Babaji, replied that he had no knowledge of the mortgage; that only a moiety of the mortgaged property belonged to him; and he prayed that an account of the

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mortgage transaction should be taken under the Dekkhan Agriculturists' Relief Act (XVII of 1879.)

Defendant No 2, Abu, the brother of the mortgagor Babaji, contended that the lands had been divided many years ago between himself and his brother, that a half share had been allotted to him at the partition; that he was not bound by the mortgage, and that the claim, so far as his share was concerned, was barred by limitation.

The Judge of the lower Court found that the mortgage executed by Babaji was proved, but that it only affected his half share, and that the debt due was now Rs. 540. He held, however, that the plaintiff's claim for possession was barred by limitation, and that having regard to the terms of the mortgage-bond, it was clearly the intention of the parties that the property should not be sold; that the provision that the mortgagee should continue in possession until the debt should be discharged was a special agreement; and that as the bond contained no promise to pay, and fixed no time for payment, the plaintiff was not entitled to either of the remedies he sought (see clause 3 (1) of section 15 of Regulation V of 1827).

The following is an extract from his judgment: —

"* * * It is proved that at the time of execution (of the mortgage) Babaji, defendant No. 1, and his brother defendant No 2, were joint * * *. They, however, effected partition after the great famine and have been separate in estate for eighteen or twenty years. There is no evidence that Babaji executed the deed as manager and for a family purpose so as to bind his brother. The mortgage, therefore, does not bind the moiety of the estate which is in the possession of defendant No. 2, or those who hold under him. It is admitted that the amount specified in the deed is made up half of principal and half of interest. The mortgage contains a promise to pay interest, and provides that, in default of payment of interest, the mortgagee shall take possession of the mortgaged property. As the mortgagee has neglected to enforce this remedy he is not entitled to interest subsequent to the mortgage. The balance due, therefore, is the original debt of Rs. 540.

(1) Section 15 of Bombay Regulation V of 1827, clause 3 :—

"Third.—In the absence of any special agreement, or recognized law or usage to the contrary, either party may at any time, by the institution of a civil suit, cause the property to be applied to the liquidation of the debt, the surplus, if any, being restored to the owner.

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"The real question for decision in this case is whether the plaintiff is entitled to either of the reliefs he claims. The claim for possession of the mortgaged property is admittedly time barred.

"The other relief sought is to recover the balance by sale of the mortgaged property.

"The deed recites that the property is mortgaged for the debt, the mortgagor promises to pay interest at five annas per cent., it is further provided that, on his making default of payment, the mortgagee shall take possession and hold possession in lieu of interest, and the last provision is that such possession shall continue until the mortgagor pays the principal and the interest that remained unpaid when the mortgagee took possession.

"It was clearly, therefore, not the intention of either party that the property should be brought to sale. The provision for the possession of the mortgagee to continue until the debt is discharged is a special agreement which takes the case out of clause (3) of section 15 of Regulation V of 1827. The deed contains no promise to pay and fixes no time for payment. The plaintiff is not entitled to either of the reliefs he claims."

THE plaintiff appealed.

Vasudev J. Kirtikar (Government Pleader) for the appellant (plaintiff):—The Judge has misconstrued the mortgage-deed in holding that it was not the intention of the parties that the mortgaged property should be brought to sale. Section 15 of Regulation V of 1827 is not applicable because we were not in possession of the mortgaged property. Clause (3) of that section cannot operate to our prejudice, because there is no special conditon in the deed that the property shall not be sold for the realization of our debt. A mortgagee has the right to recover his mortgage money by sale of the mortgaged property—*Motiram* v. *Vitai* [1]; *Venkatesh* v. *Narayan* [2]; *Mahadaji* v. *Jotiba* [3]; *Dalu* v. *Vithu* [4], *Yashvant* v. *Vithal* [4].

We do not press our claim against the property in the hands of defendant No. 2.

There was no appearance for the respondents (defendants).

JENKINS, C. J.:—This is a suit brought by the plaintiff to enforce a mortgage security, and the first question to be considered is whether the claim is time-barred. The District Judge of Sholá-

(1) (1888) 13 Bom., 90.
(2) (1890) 15 Bom., 183.
(3) (1892) 17 Bom., 425.
(4) (1895) 20 Bom., 408.

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pur-Bijápur has decided this in the affirmative on the ground that the plaintiff's only remedy was a suit for possession.

On the part of the appellant it is contended that this decision is wrong, and that the plaintiff is entitled to enforce his security by sale. In our opinion this contention is right.

Having regard to the date of the mortgage, the Transfer of Property Act (IV of 1882) does not apply, but the District Judge appears to have thought the case was governed by section 15 of Regulation V of 1827, and on that assumption he has held that there was a special agreement, which takes the case out of clause 3 of that section. We do not agree with this view. Even if the section applied, we think there was no such agreement. But beyond that it seems to us that the section has no application seeing that the mortgagee never was in possession. We, therefore, hold in accordance with the prior decisions of this Court, to which our attention has been drawn, that the plaintiff is entitled to enforce his security by sale, and consequently that his claim is not barred.

The Government Pleader who appears for the plaintiff has conceded that he cannot support the claim for a sale of the entirety and, therefore, the decree will not affect the moiety, which is in the possession of the defendant No. 2 or those who hold under him.

The District Judge has held that the balance due is Rs. 540, and as its correctness has not been impugned before us, we do not disturb his finding on that point.

The Court allows the appeal, reverses the decree of the lower Court and passes a decree for the plaintiff for Rs. 540 and costs in this and the lower Court to be realized by a sale of the moiety of the mortgaged property in the possession of respondent No. 1, or those who hold under him, in case such amount and costs are not paid within six months from the date of the decree of this Court.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. June 12.

KALLIANDAS (ORIGINAL PLAINTIFF), APPELLANT, v. TULSIDAS (ORIGINAL DEFENDANT) RESPONDENT.*

Injunction—Light and air—Easement—Damages—Practice where amount of injury does not justify injunction.

The plaintiff sued for an injunction restraining the defendant from erecting a building which interfered with the light and air coming to the plaintiff's house. The lower appeal Court found that, though the light and air of the plaintiff's house was sensibly diminished by the defendant's building, there was not such substantial damage done as would justify an injunction, and it dismissed the suit with costs, being of opinion that the plaintiff's remedy, if any, was a suit for damages.

Held, that the lower Court was right in not granting an injunction, but instead of dismissing the suit, and referring the plaintiff to another suit for damages, it ought itself to have directed an inquiry as to the damages sustained by the plaintiff by reason of the diminution of the supply of light and air to his house.

SECOND appeal from the decision of E. H. Moscardi, District Judge of Surat.

Suit for an injunction. Plaintiff sued for an injunction directing the defendant to pull down a building which he was erecting on a piece of open land adjacent to plaintiff's house, and restraining him from proceeding with the building, alleging that the building materially diminished the supply of light and air which the plaintiff had uninterruptedly enjoyed for more than twenty years through the windows of his house, which overlooked the open land.

The Subordinate Judge granted the injunction.

On appeal the District Judge rejected the plaintiff's claim, holding that no sufficient case for an injunction had been made out. His reasons were as follows :—

"The point for decision is whether the diminution of light and air caused by the defendant's building is sufficiently serious to justify an injunction for the removal of the building.

"I find this in the negative. The law on the subject is to be found in *Ghanasham v. Moroba*(1), in which it is laid down that in order to justify an injunction

*Special Appeal, No. 684 of 1898.

(1) (1894) 18 Bom., 474.

for the removal of a building on the ground of its interfering with the access of light and air to another building, it is not enough to show that the light and air of the latter building have been sensibly diminished, but it must be shown that the damage is large, material, and substantial, and that the latter building has been rendered unfit for the purpose for which it might reasonably be expected to be used I have personally inspected the buildings in suit, and have come to the conclusion that applying this principle there is no ground for an injunction. The building complained of is a sort of woolen staging or set of two balconies one above the other, entirely open on the west side, on which it is quite close to plaintiff's house, in fact virtually contiguous to it, and on the east or opposite side. The light coming to the windows on the ground and first floors is somewhat diminished by the two balconies overhanging them, but not to such an extent as to be even disagreeable Two small openings in the wall of the ground floor, chiefly intended for ventilation, are closed up so far as the light from them is concerned But they still admit the air freely. A window in the upper or second storey is crossed by the upper balcony of the defendant's wooden staging, and there is a sensible diminution of light there, but the room cannot be said to be completely darkened or rendered unfit for the uses to which it is ordinarily put. From the lower balcony the defendant and his family can approach close to the plaintiff's first floor window, and look right through his house, and this is no doubt intensely disagreeable to the plaintiff. This, however, is not the ground on which the injunction is sought. I am, therefore, of opinion that a case for an injunction is not made out; because though the light and air of the plaintiff's building has been sensibly diminished, there is not such a large, material and substantial damage as would justify the granting of an injunction, nor has the plaintiff's building been rendered unfit for any purpose for which it might reasonably be expected to be used. The plaintiff's remedy, if any, is by a suit for damages.

"I reverse the decree of the lower Court, and reject the plaintiff's claim with costs on plaintiff throughout."

Against this decision plaintiff preferred a second appeal to the High Court.

Nagindas Tulsidas for appellant.

N. V. Gokhale for respondent.

PARSONS, J. :—The District Judge has given good and sufficient reasons for not granting an injunction in the present case, but he was wrong in dismissing the suit with costs and referring the plaintiff to another suit to recover pecuniary damages for what was found by him to be a sensible diminution of the supply of light and air to the plaintiff's house. It is within the jurisdiction of a Court to give relief by way of damages when it refuses

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an injunction, and it is the practice of the Courts in England to direct an enquiry as to damages though not prayed by the bill—*Lady Stanley of Alderly of Earl* v. *Shrewsbury* [1]. In the present case the plaint asked for an injunction or for such other relief as the Court might think fit to grant. The case thus resembles the case of *Catton* v. *Wyld* [2], in which a decree to ascertain what damages the plaintiff had sustained was ordered.

We ask the Judge of the lower appellate Court to take evidence and record a finding on this issue, *viz.*:—

What money damages is the plaintiff entitled to recover from the defendant for the injury complained of and found proved? and certify the same to this Court within two months.

(1) (1875) 19 Eq., 616. (2) (1863) 32 Beav., 266

CRIMINAL REFERENCE.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899.
June 22.

QUEEN-EMPRESS *v.* DABHAI KABHAI.*

Salt Act (Bom. Act II of 1890), Sec. 47 (a)[1]*—Possession of salt water with the intention of manufacturing salt.*

The mere possession of salt water with the intention of manufacturing salt therefrom is not an offence under the Bombay Salt Act (Bom. Act II of 1890).

REFERENCE by J. K. N. Kabraji, District Magistrate of Kaira, under section 438 of the Code of Criminal Procedure (Act V of 1898).

The accused was convicted by the Third Class Magistrate of Borsad under section 47 (*a*) of Bombay Act II of 1890 and sentenced to a fine of Rs. 5, for having in his possession salt water for the purpose of manufacturing salt.

* Criminal Reference, No. 66 of 1899.

(1) Section 47 (*a*) of Bombay Act II of 1890 provides as follows:—"Whoever, in contravention of this Act, or of any rule or order made under this Act, or of any license or permit obtained under this Act, manufactures, removes, or transports salt, shall, for every such offence, be punished with fine which may extend to Rs. 500 or imprisonment for a term which may extend to 6 months or both."

fields which have been found to be "khásgi thikáns" allotted to the said takshim. There is no question as to the identity of the twenty thikáns as found by the Subordinate Judge after careful enquiry. Both the lower Courts find that, though there has been no formal partition by metes and bounds of the khoti, yet the different sharers have for mutual convenience allotted to each share certain khoti nisbat and also khoti khásgi fields, and that the twenty thikáns in question were the khásgi thikáns so allotted to the 11 pies takshim of Naro and Balaji, who are now represented by defendants Nos. 1 to 3. Defendants Nos. 7 and 8 are brothers of Naro and Balaji. Defendant No. 6 is an assignee of defendant No. 7, and defendants Nos. 4 and 5 are tenants of defendants Nos. 1 to 3. It was admitted that the custom of the village is for the khoti sharers [illegible] to pay thal for the khásgi thikáns in their respective shares. This is a custom which is very prevalent in khoti villages.

Now, postponing for the moment a question which arises regarding four of the twenty thikáns in question said to have been sold to one Vishvanath, and speaking of the twenty thikáns as the khásgi fields belonging to the 11 pies takshim of which plaintiff was mortgagee and then purchaser, the first question which arises is, did plaintiff by his position as mortgagee and purchaser of the 14 pies takshim acquire any interest in these twenty khásgi thikans? It is quite possible for a khot when executing a mortgage of his share in a "khoti" to reserve a portion and not mortgage the whole. Thus he may reserve his khásgi thikáns, and only mortgage his share in the rents received from the tenants of the khoti nisbat lands. Thus in *Mahadev* v. *Kashinath*(1) we have the illustration of a khoti takshim and a khoti khásgi thikán allotted to that takshim, separately dealt with. On the other hand, the same Judges (Sir C. Sargent, C. J., and Nanabhai Haridas, J.) held in *Govindrav* v. *Ranji*(2) that it was wrong to suppose that the purchase of a takshim would not include the khásgi lands allotted to that takshim, even though they were not expressly recited, and that the mention of the takshim as including the lands in the village would necessarily comprise the khoti khásgi lands. Thus the contrary opinion

(1) P. J. for 1838, p. 358. (2) P. J., 1888, p. 59.

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expressed by the District Judge in the present case is shown to be opposed to authority.

Further, the District Judge was under the impression that the views which he expressed were supported by the opinion of Captain Wingate, as shown in an extract from a report of that officer quoted on page 215 of the Bombay Gazetteer, Vol. X. The passage in question is stated in the Gazetteer to be taken from Bombay Government Selections CXXXIV, page 53; and if the District Judge had had the opportunity of referring to these Selections instead of quoting from the Gazetteer, he would have found that the authority he relied on did not really afford support to the view which he was expressing. Captain Wingate was seeking to establish his proposition that a khot was a mere collector of Government dues, and had no interest in the lands cultivated by the rayats. He went on to say:—

"It will be found, I believe, that the rice and garden lands of khoti villages have generally been divided into separate occupancies, which are held by the parties in possession quite independently of the khoti vatan. The holders of these occupancies either pay revenue to the khot, or, as is sometimes the case when they themselves hold a share of the khoti vatan, they pay nothing, the exemption in this case forming part of the profits of their share. But the rents in all cases and not the land form the khoti vatan. And in all the mortgage deeds executed by the khots it will be found that the mortgage refers to a share of the vatan, or the right to the rents and profits of the village generally, but never to the possession or ownership of a definite and describable portion of the village lands. Particular pieces of lands are occasionally mortgaged by a khot, but such land is invariably, if I mistake not, mortgaged as the private property of the individual, and not as a portion of the khoti vatan. The mortgagee, with a view to secure his own interests, has the mortgage-deed worded in as comprehensive and also specific terms as possible, and if the khoti vatan comprehended the ownership of land, (inclusive of a right of occupation) I have no doubt whatever that this would be particularly described."

Captain Wingate then went on to describe a mortgage-deed, which like plaintiff's mortgage-deed in the present case was as comprehensive as possible; but (said Captain Wingate):

"The nature of the vatan rights over all these items is not distinctly specified. They are to be inferred from the subsequent part of the deed, in which the mortgagor, who by the deed sinks into the position of an ordinary khoti rayat, engages to pay for the rice land he cultivates himself as may be settled by agreement between himself and the mortgagee, and for the varkas as a chautheli, i. e. at the rate of one-fourth of the crop."

So here the mortgagor khot Naro for himself and his brother Balaji by the mortgage-deed (46) covenanted that for their home-farm (*amhi ghari sheti karun tyachi tal*) they would pay a crop share—one-fourth—by appraisement: they became ordinary khoti rayats.

But this arrangement was soon afterwards modified. Besides the khoti khásgi fields allotted to a khoti sharer, he may cultivate some of the khoti nisbat lands. These latter fields would not by being in his occupancy be necessarily changed from khoti nisbat to khoti khásgi, for that would change the due proportion of khoti khásgi fields allotted to each share. So to prevent any misunderstanding the mortgagor khots, Naro and Balaji, passed the agreement (48), in which they recited the covenant of the mortgage-deed that they would pay crop share, one-fourth, for their home-farm lands (*khasgat amhi sheti karun*), and it was then agreed that instead of thal they should pay a lump sum of Rs. 21 annually for their khásgi fields, which were set forth in detail: if beyond these they themselves cultivated any other lands, then for such they were to pay thal. For the twenty khoti khásgi thikáns set forth they were to pay the annual makta of Rs. 21 until the mortgage should be redeemed. And from the actual cultivators of these khoti khásgi thikáns, *i. e.*, Gana, Hari and Dhondo, a separate writing was taken binding these men to pay the mortgagee Rs. 20-4-0 per annum, the balance of 12 annas being recoverable from the mortgagors.

Thus we see that the khoti sharers were not themselves actually cultivating these 20 khásgi thikáns. But it was none the less true that they constituted their "home-farm," which they might cultivate by hired labourers or by letting to yearly tenants. It is difficult to see how a khoti sharer's proprietary interest in such lands could ever be independent of his share in the khoti vatan. Such an idea would involve a contradiction in terms. A khoti khásgi field must have some connection with a khoti vatan. Of course in a mixed village, containing both dhára and khoti lands, a khoti sharer may hold certain dhára lands, and these would be quite independent of his share in the khoti vatan. If he mortgaged these, the language used by Captain Wingate would be strictly accurate. Possibly the District Judge in this case was

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misled by a confusion of thought shown by the Subordinate Judge in the Court of first instance. The Subordinate Judge said: "In a purely khoti village all land is khoti, and there are three varieties of it according to the difference of interests of the khot in the lands. The three classes are khásgi, kulargi and khot-nisbat." Now a reference to Molesworth and Candy's Dictionary shows that in a purely khoti village there cannot be such a thing as kulargi lands. A kulargi village is one held by dhárekaris in opposition to a khoti village. In a purely khoti village there can be no dhárekaris. The land is all khoti, the division being khásgi, lands held by the khots themselves (their "home-farm" as it has often been called), and the khoti nisbat lands, *viz.*, lands held by cultivators most of whom have occupancy and some also transferable rights.

The District Judge remarked that "the occupancy right of khásgi lands has little in common with the rights of a khot as such, which are generally those of management and levy of rent, and that khásgi lands may have been acquired quite apart from the khoti, either by hereditary possession before the acquisition of the khoti, or by transfer from occupancy tenants after the acquisition of the khoti.' And in support of this view we were referred to certain remarks made by Mr. Justice Parsons at the close of his judgment in the *Secretary of State* v. *Narayan*[1]. Now it must be self-evident that if a "khoti khásgi" field may have been acquired quite apart from the khoti, then it cannot be a *khoti* khásgi field. If it was acquired before the acquisition of the khoti, then it would apparently be dhára. If it was acquired by transfer from the occupancy tenant thereof after the acquisition of the khoti, then it would still remain khoti nisbat (as it must have been when held by the occupancy tenant), and it would require the assent of the whole body of the khoti sharers to change it from khoti nisbat to khoti khásgi. Mr. Justice Parsons' remarks obviously apply solely to the case of one khot owning the whole interest in a khoti vatan; and we have his authority for saying that this is so. Of course, if such a khot brings waste lands of his village into cultivation he can treat them as khoti khásgi: if they lapse to him from any occupancy tenant he can equally treat

[1] P. J. for 1899, p. 12.

them as khoti khásgi. If the khotship were abolished, and the village treated by Government as an ordinary rayatwári village, the khot would hold such lands as an ordinary survey occupant. In this case the District Judge has in several places in his judgment referred to a khot's interest in his khoti khásgi fields partaking of a dual nature, *viz.*, his own occupancy right, and his right to take rent from his tenant-at-will, whom he may put into actual occupation of the land. But there is a fallacy at the foundation of this proposition. For what is an "occupancy right"? It is a right established by a tenant against his superior holder, to hold his land in perpetuity conditionally on the payment of the rent from time to time lawfully due by him to the superior holder. How can a khot establish such a right against himself? If he has such an occupancy right it must be against himself and his co-sharers in the khoti vatan. If he sells his khoti - that is the sum total of his interests in the khoti vatan -- then *ex hypothesi* the purchaser acquires this occupancy right. And if, as the District Judge holds, on the occasion of such a sale this occupancy right does not pass to the purchaser, then the vendor, who is no longer a khot, is an occupancy tenant of the fields which were once khoti khásgi, but have now become khoti nisbat. This shows that there cannot be an "occupancy right" in khoti khásgi lands.

The Survey Department, even when it attempted to apply a Deccan rayatwári system to the villages of the Konkan, did not overtly assert a right to make the actual cultivator of a khoti khásgi field a survey occupant of that field. It did so with regard to all khot nisbat fields, whether the cultivator was of old standing or recent. But the "khoti khásgi thikáns" were apparently left in the uncontrolled ownership of the khot, to whose takshim they were allotted, or of the whole body of khots, if there had been no such partition or allotment. It is true that section 5 of Bombay Act I of 1880 speaks of a holder of "khoti land" (which would include khásgi) acquiring under certain conditions occupancy rights. But that comes under the heading "inferior holders" in contradistinction to the heading "khots" above section 4, and, therefore, it would only empower the Settlement Officer at the most to give an occupancy right to the actual cultivator of a

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khoti khásgi thikán against the khoti sharer, to whose share this thikán had been allotted. This, even if within the letter of the Statute, would be distinctly opposed to the intention of the makers of the Statute, and the point if ever it arises will require careful consideration.

Here the question is, whether a khoti sharer has, with reference to a khoti khásgi thikán allotted to his share, an "occupancy right" against the body of khoti sharers, so that if he parts with his share in the khoti, the khoti khásgi lands, which had been allotted to his share, at once pass from having been khoti khásgi to khoti nisbat. The obvious answer to such a question is that if the nature of the lands is thus changed, then the purchaser by his purchase does not acquire the full interests of his vendor. The vendor had the right of doing what he liked with those lands: he could cultivate them himself one year: he could let them to a tenant the next. He paid nothing to his co-sharers in respect of those lands, except the survey assessment. But the vendee's position would be quite different: and as regards the co-sharers in the vatan the proportion of khoti nisbat and khoti khásgi fields would be entirely changed. The District Judge infers that the "occupancy right," which a khot in his opinion has in his khásgi fields, could not have in the present case passed to the plaintiff as purchaser of the khoti takshim, otherwise the plaintiff, who was first mortgagee and afterwards in 1881 purchaser from the Court purchaser in 1880 of the 14 pies takshim, would at the time of the purchase have taken actual possession of the khásgi thikáns, and subsequently instead of enhancing the rent he would have given notice of ejectment. But this inference is not good. Plaintiff and his agent are not actual cultivators. There is no reason why plaintiff to this day should not be perfectly willing to let defendants Nos. 1—3 remain in possession, if they will peaceably pay the rent lawfully due by them to their khot. But that is just what they will not do, as will presently be shown: hence this suit in ejectment.

Plaintiff having become the full owner of the 14 pies takshim, and not merely the mortgagee, sued defendants Nos. 1—3. He was at first unsuccessful, but after he had given notice that the agreement for makta (48) was at an end, he succeeded in Suit No. 253

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of 1889 in recovering *thal* from Naro and Balaji and in Suit No. 257 of 1889 from Vishwanath. The Subordinate Judge held that the mortgage and the agreement for makta were at an end; that Naro and Balaji had lost their status as khots and must be regarded as ordinary tenants in a khoti estate, and in the absence of a contract must pay rent (thal) according to the usage of the locality. At the end of his judgment the Subordinate Judge remarked that "the makta fixed by the Settlement Officer was fixed on the 17th November, 1888, and the present suit in so far as it seeks a modification of it is within time." On appeal to the District Court the Subordinate Judge, A. P., reversed the Subordinate Judge's decision, holding that the agreement to pay makta till the mortgage was redeemed, meant that makta should always be paid, the words 'till redemption' being simply put in as an expression of hope. It is unnecessary to further notice the judgment of the First Class Subordinate Judge, A. P. His decision was reversed by the High Court and that of the Subordinate Judge restored—*Rão Râje Sir Dinkarrav* v. *Narayan*[1] Sargent, C. J., and Candy, J., held that by the notice putting an end to the makta agreement the tenancy-at-will, under which the defendants must be deemed to have been holding after the expiration of the agreement, was thus put an end to, and they thereupon became liable to pay thal like all other cultivators of khoti lands. This decision must mean that, in the absence of any agreement, Naro and Balaji were tenants-at-will of the khoti khásgi lands, which as part of their takshim had passed to plaintiff. As such tenants-at-will they would in the absence of specific agreement pay thal like occupancy tenants (section 8 of Bombay Act I of 1880). But they would be none the less tenants-at-will. And, as shown before, it is difficult to see how inferior holders of khoti khásgi lands can be regarded as anything but tenants-at-will of those lands. For all these reasons we are of opinion that the Subordinate Judge was right in holding that plaintiff being now khot of the 14 pies takshim can after due notice eject defendants Nos. 1—3 from the khoti khásgi thikáns.

Then comes the question, how is this right affected by the fact that while plaintiff was merely the mortgagee of the 14 pies

(1) (1893) P. J., p. 550.

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takshim, and before the Court sale to Ambardekar, who sold to plaintiff, four of the khásgi thikáns were purchased by one Vishwanath, who sold them back to Naro and Balaji in 1893 [the District Judge says 1887, but that is apparently a clerical error]. The Subordinate Judge held that Vishwanath was merely a benamidár for Naro and Balaji; but the District Judge took the contrary view, and this is a finding of fact with which we cannot interfere. The equity of redemption of this portion of the mortgaged property having been purchased by Vishwanath in 1879, plaintiff and Ambardekar, when they purchased in 1880 and 1881, became owners of the whole takshim, except these four thikáns, and the mortgage on them is still outstanding. Thus Naro and Balaji having purchased from Vishwanath stand in relation to the mortgagee in the same position as they stood before the sale to Vishwanath. Regarded in that light they might be entitled to plead that they never could be ejected as long as they paid the fair proportion of the makta, Rs. 21, due on the four fields. But when plaintiff brought the Suit No. 255 of 1889 against Naro and Balaji, in which it was eventually held that the agreement for makta was at an end and that Naro and Balaji were tenants-at-will, he at the same time brought a similar suit against Vishwanath (No. 257 of 1889), and this suit was eventually decided in the same way as the suit against Naro and Balaji. In a subsequent suit for thal of the years 1888-89 to 1890-91 (Suit No. 257 of 1892) plaintiff obtained a consent decree to the same effect as before. Further, in Suit No. 503 of 1895 plaintiff claimed thal for all the twenty thikáns for the years 1891-92 to 1893-94, and the District Judge has held in that case that for these four fields defendants Nos. 1—3 must pay thal, so the makta agreement is no longer in force as regards these four fields. Plaintiff has appealed against the District Judge's decision as regards the sixteen thikáns, but defendants have filed no cross-objections as regards the four fields. Therefore as regards them defendants Nos. 1—3 must be regarded as mere tenants-at-will, and plaintiff, who is khot, whether as mortgagee or purchaser, can eject them after due notice. Whether defendants Nos. 1—3 can now sue to redeem the four thikáns and so regain their position as khots of the four fields, is a question as to which we need not express an opinion.

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The evidence against the accused showed that salt water was found in his house and that he admitted his intention to manufacture salt therefrom. But no salt was actually manufactured.

The District Magistrate was of opinion that the offence of manufacturing salt without a permit was not complete, and that the mere intention was not punishable under the Act.

The District Magistrate, therefore, referred the case to the High Court.

The reference came on for disposal before Parsons and Ranade, JJ.

There was no appearance for the Crown or for the accused.

PARSONS, J.:—The District Magistrate is right. The possession of salt water even with the intention of manufacturing salt therefrom is not made an offence under the Bombay Salt Act, 1890. We, therefore, reverse the conviction and order the fine to be refunded.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

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LAKSHMIBAI AND ANOTHER (ORIGINAL, DEFENDANTS), APPELLANTS, *v.* SARASVATIBAI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu law—Adoption by senior widow—Widow's capacity to adopt—Implied prohibition.

In the absence of express prohibition the husband's consent to an adoption by his widow is always to be implied.

The question of implied prohibition is one of legal inference from the facts found, and it is open to the Court to inquire into its correctness in second appeal.

Semble.—In the Bombay Presidency the widow's right to adopt is inherent and not merely delegated.

Semble.—In the absence of express prohibition by the husband, the widow's power to give or take in adoption is co extensive with that of the husband.

SECOND appeal from the decision of Ráo Bahádur Vaman M. Bodas, First Class Subordinate Judge of Sholápur with appellate

* Second Appeal, No. 689 of 1898.

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powers, confirming the decree of Rão Sáheb M. Davlatrai, Subordinate Judge of Pandharpur.

Suit to set aside an adoption.

In April, 1891, one Yeknath Ramchandra died without leaving a son, but leaving two widows, *viz.*, Lakshmibai (defendant No. 1) and Sarasvatibai (plaintiff), and one daughter Mathurabai, the child of Sarasvatibai.

In September, 1891, the two widows partitioned Yeknath's estate, each taking a moiety.

In January, 1895, Lakshmibai adopted one Ganesh (defendant No. 2) whereupon Sarasvatibai and her daughter Mathurabai brought this suit to set aside the adoption, and for a declaration that Lakshmibai had only a life interest in the moiety of the property taken by her on partition, and that Ganesh (her alleged adopted son) had no interest in the property at all.

The plaintiffs contended that the adoption was invalid on the following grounds:—

(1) That Lakshmibai (defendant No. 1) had not only no authority from her husband to adopt, but had been forbidden to adopt.

(2) That she had refused to live with her husband, and as a fact had lived separate from him for twenty years.

(3) That the authority to adopt had been given to Sarasvatibai (the plaintiff) by Yeknath, the deceased husband.

(4) That at the time of the adoption, Lakshmibai was untonsured.

(5) That Ganesh, the adopted son, was older than Lakshmibai, who adopted him.

(6) That Lakshmibai had received half of the deceased husband's property on the express condition that she would not adopt.

The Subordinate Judge found that when partition of Yeknath's property was made between the two widows, it was not agreed that Lakshmibai No. 1 should not adopt; that the adoption was not invalid on the ground of Lakshmibai being untonsured; that Sarasvatibai (plaintiff No. 1) was not expressly authorized by

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Yeknath to adopt; that Lakshmibai was not expressly forbidden to adopt; that Ganesh was not older than Lakshmibai. He held, however, that the fact that Lakshmibai had been for a long time separate from her husband, and had been on unfriendly terms with him, prevented her from making a valid adoption. He, therefore, declared the adoption invalid.

On appeal by the defendants the Judge confirmed the decree, holding that a widow's power to adopt was not inherent, but delegated by her husband, and that under the circumstances of the present case no inference of such delegation could be made.

The defendants preferred a second appeal.

Setlur with *Balkrishna N. Bhajekar* for the appellants (defendants):—We contend that a widow's power to adopt is not a delegated power, at least in the Bombay Presidency. It is a privilege which she enjoys in right of her wifehood—of her being a *patni*. No doubt this power, like all other powers of hers, is subject to her paramount duty, namely, the duty of implicitly obeying the commands and wishes of her husband. It is this duty that prevents her from exercising this power without the permission of her husband during his lifetime—*Narayan* v. *Nana Manohar*[1]. But the Vyavahar Mayukha (Mandlik's Hindu Law, p. 57) distinctly lays down that even though alive, if he becomes infirm on account of age or otherwise and incapable of exercising his authority, she can herself adopt without waiting for his permission. After his death, unless he has expressed his wish, either in words or by conduct, that she shall not adopt, she has always the right to adopt. It has been held that a minor's widow can adopt—*Patel Vandravan* v. *Patel Manilal*[2]. Then, again, when there are several widows, the eldest alone can adopt, and, as pointed out in *Padajirav* v. *Ramrav*[3], the preference is based on the fact that the eldest widow alone is *patni* and as such is preferentially entitled to the privileges of that status.

[JENKINS, C. J.:—When a wife or widow adopts, to whom does she adopt—to herself or to her husband?]

(1) (1870) 7 Bom. H. C. Rep., A. C. J., 153. (2) (1890) 15 Bom., 565.
(3) (1888) 13 Bom., 160 at p. 166.

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We submit that the question in that form cannot arise, as the Hindu law regards the husband and wife as one individual. The identity of the wife with her husband is a leading principle, not only of the Mitákshara, but of the whole Hindu law—*Gojabai* v. *Shrimant Shahajirao* [1]. So when the husband adopts, he adopts for her, and when the wife or widow adopts, she adopts for him and for herself also. The circumstance that the husband has the authority at any time to deprive the wife permanently of the power to adopt, does not necessarily imply that the power is his and not hers. It is only an instance of the obedience which the wife owes to the husband according to Hindu law. This is shown clearly by the law as now settled relating to the power of a co-parcener's widow to adopt—*Vithoba* v. *Bapu* [2].

[JENKINS, C. J.:—What about the disqualified heir's widow; can she adopt?]

We submit she can. Such an adopted son, no doubt, would not get the share which the father would have got if he had not been labouring under a disqualification, but this disability of such adopted son is due to the Court's engrafting the principles of the law of property on the law of adoption which under Hindu law is a quasi-religious institution. The Full Bench decision in *Ramchandra* v. *Mulji Nanabhai* [3] on the question of the motive of a widow in making an adoption removes all doubts on this point, and we submit that so far as the Bombay Presidency is concerned, the power of the widow to adopt is her own and not a delegated power.

Even if the view we contend for be not upheld, still from the facts of the present case it is impossible to infer any implied prohibition. The Judge has relied on *Dnyanoba* v. *Radhabai* [4]. But the facts of that case were totally different.

[JENKINS, C. J.:—Is not the question of implied prohibition one of fact and the Judge's finding on it binding on us in second appeal?]

Implied prohibition is a mixed question of law and fact, and it is to be inferred from facts found, and this Court has the power to see whether the inference drawn is legal or otherwise. The plaintiffs

(1) (1892) 17 Bom., 114 at p. 122.
(2) (1890) 15 Bom., 110.
(3) (1896) 22 Bom., 558
(4) P. J., 1894, p. 22.

have admitted, by giving us after the husband's death a half share in the property, that our status as *patni* was still existing, and that being so, we had a right to exercise the power of adoption incidental to that status.

Narayan G. Chandavarkar for the respondents (plaintiffs) :—We do not deny that in the Bombay Presidency the widow has always the power to adopt in the absence of the husband's prohibition, express or implied. In the present case the Judge has, after careful consideration of all the circumstances, found that there was an implied prohibition. Whether in a particular case there was implied prohibition or not, must be decided with reference to the circumstances of the case, and it is a question of fact. In the present case the detailed description given by the Judge of the scene that occurred at Ahmednagar at the time the defendant separated from her husband, can leave no doubt that she had given up all connection with her husband. Under these circumstances the inference drawn by the Judge, who is himself a Bráhmin, of implied prohibition is quite justifiable and it cannot now be disturbed. It would be unnatural to infer that the husband would have directed his widow, who separated from him in her very childhood, not long after the marriage, and who never cared to go back to him during the twenty-five years of his subsequent life, to adopt a son for himself while there was another widow of his who always lived with him and had borne him a daughter. These circumstances, we submit, clearly show that there was an implied prohibition by the husband.

Setlur, in reply :—To imply prohibition it is not enough to show that there was no affection between the husband and the wife. It must be shown that the husband applied his mind to the question, and indicated his desire that the wife should not adopt—*Ramji* v. *Ghamau*[1].

JENKINS, C. J.:—The plaintiffs have brought this suit to obtain a declaration that the adoption of Ganesh Yeknath Kowlagi (defendant No. 2) by Lakshmibai (defendant No. 1) is unauthorized and invalid. The adoption in question was made by defendant No. 1 as the elder co-widow of Yeknath Ramchandra Kowlagi; and it is impugned by the plaintiffs, who are the junior co-widow

(1) (1879) 6 Bom., 498 at p. 504.

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and her daughter, on the ground that defendant No. 1 was, by the implied prohibition of the deceased husband, disqualified from adopting. It is, so far as this present appeal goes, conceded that Lakshmibai, as the senior co-widow, could adopt in the absence of prohibition, and the only question to be determined is whether a prohibition is to be implied: for admittedly none is expressed. Both the lower Courts have found this in the affirmative, but it is contended before us on the part of the appellants, the elder co-widow and the boy whom she has purported to adopt, that this finding is based on inferences not justified by the facts, and that consequently it is open to us, even on second appeal, to enquire into its correctness. The respondents, on the other hand, maintain that this finding cannot be questioned in this Court, and in any case it is correct.

It appears to me that the determination of the question whether an incapacity on the part of the elder co-widow results from the facts found by the lower Court, under the circumstances of this case, involves matter of legal inference, and is in consequence properly open to us even on second appeal. It has been argued before us on the part of the appellant that a widow's power to adopt does not rest on any delegation from her deceased husband, but is her own inherent right, and it is obvious that the distinction may have more than an academic value. The commentaries, which prevail in this Presidency, seem to me strongly to favour the view thus contended for, but some at any rate of the more recent decisions in this Court contain expressions that point in the other direction. In the view I take of the present case, it is not necessary to decide the point, but the inclination of my opinion (though I reserve to myself the right to reconsider the matter hereafter, if necessary) is that in this Presidency the widow's right is inherent and not merely delegated.

Though at first sight it might appear that the husband's right to forbid, indicated that his authority, either express or implied, was necessary, still it may well be answered to this that his right to forbid and the widow's consequent inability to adopt are referable rather to the paramount duty incumbent on a Hindu wife to obey her husband's command, than to a delegation of

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power from him. But even if it be that the widow's right is not inherent, still it must be conceded that at any rate the husband's consent is, in the absence of prohibition, always to be implied. In this case, as I have already said, there is no express prohibition, nor can I see in the circumstances anything to justify the conclusion that one should be implied. Let it be granted that the parties did not live together; still that alone cannot be sufficient, and I am wholly unable to see that the husband by any disposition of his property or in any other way has so acted that a prohibition proceeding from him can be implied. At the time of separation the elder widow was not deprived of the token of marriage, and her status and right to succeed to a share in her husband's property have been recognized by the compromise to which our attention has been called; nor has there been such unwifely conduct on her part as, according to the authority on which the respondents rely, would disqualify her from her right to adopt. I, therefore, hold that a loption made by her is valid. I think the decision under appeal is wrong: it must, therefore, be reversed and the suit dismissed with costs here and in the lower Courts.

CANDY, J.:—The question in this second appeal is whether, on the facts found by the lower Courts, the legal inference arises that there was an implied prohibition by the husband preventing his senior widow Lakshmibai from adopting a son.

This question is, in my opinion, one of law and not of fact. To borrow the language of the Privy Council in the recent case of *Lala Beni Ram et al.* v. *Kundan Lall et al.* (decided 11th March last)[1] with reference to the cognate question of acquiescence, implied prohibition is not a question of fact, but of legal inference from the facts found. It is unnecessary to recite at length those facts, which are fully set out by the learned Judge of the lower appellate Court, who fully believed the story told by the independent witness Mr. K. Patwardhan. That shows that in 1878 or 1879, when the wife was still almost a child, on the one side the wife and her father, and on the other side the husband and his mother, came to an agreement that for the future the wife

(1) (1899) 26 Ind. Ap., 58 at p. 65.

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should live with her father, and not with her husband, who should in no way be liable for her maintenance. It is unnecessary to discuss the question as to who was mainly responsible for this estrangement, but it is admitted that there never has been any charge made against the lady's moral character. In this respect, the case is entirely different from *Dnyanoba* v. *Radhabai* (1), quoted by the lower Courts. In that case, the husband repudiated his wife on account of her bad conduct, and she formed a *pat* marriage with other men. Under those circumstances this Court held that it was impossible to hold that there was any implied authority in the woman to adopt, and that express authority would, therefore, be necessary.

Here the learned Judge of the lower appellate Court has held that as a general rule in this Presidency where there is no express prohibition by the husband—and there was admittedly none in the present case—then there is implied authority, but that this general rule may be subject to exception under circumstances which show that there was implied prohibition. He held that in the present case there were such circumstances which showed not only that there was an implied prohibition, but also that an express authority was necessary. In my opinion such an inference was wholly unjustified by the facts. The story told by Mr. Patwardhan shows that while Lakshmibai absolutely refused to join her husband and mother-in-law in their pilgrimage to Paithan, asserting her great unhappiness with them, her father also refusing to let her go and asserting that she had been cruelly treated by her mother-in-law and pointing to a branding mark on her person, on the other hand the mother-in-law, not denying the branding, was willing that the girl should stay with her father, if he would be responsible in future for her maintenance, and if the girl would give up her ornaments. The mother-in-law even demanded the girl's *mangalsutra*, but this was not given up: only two ornaments were taken by the girl from her person and given to the mother-in-law, who then went away with her son, the latter having been a silent party in these proceedings. From that day Lakshmibai never saw her husband again. After some years—shortly after her husband's death—she went to his house

(1) P. J. for 1894, p. 22.

and claimed from the junior widow the half share in his property. Her position as his senior widow was eventually recognized, and she was given the property. Nothing was then said about any adoption; the idea did not apparently occur to the parties. Subsequently she adopted the second defendant.

On these facts, which are undisputed, it seems to me impossible to draw the inference that express authority was necessary, or that the husband impliedly prohibited adoption.

I have treated this case on the principle followed by the lower appellate Court, *viz.*, that it was for the party contesting the adoption to show that under the circumstances express authority from the husband was necessary, or that there was an implied prohibition on his part. It was contended by the learned pleader for appellants before us that the power of a widow to adopt is a right incidental to her position as widow, and does not depend upon any authority expressly or impliedly delegated to her by her husband, and that, therefore, in the absence of any express prohibition by the husband, the right remains unimpaired. In the view which I take of the case it is unnecessary to discuss the authorities quoted by the learned counsel. But I may allude to a recent case, not quoted by counsel, which is of the highest authority, and which may be used as supporting his contention. It is the case of *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (1) decided by the Privy Council on the 11th March last. In that case the point was taken that the gift or reception of an only son in adoption, if not invalid in law, is so improper that in the absence of express authority given by a husband, his widow has no power to effect it. Their Lordships said: "The only authority for the argument of the appellants is the opinion of the late Sir Michael Westropp delivered in the case of *Lakshmappa* v. *Ramava*, which was decided in the High Court of Bombay in the year 1875 and a report of which was after a long delay * inserted in the 12th Bom. H. C. Rep., p. 361. That learned Judge

(1) See (1899) 26 Ind. App., 113; 22 Mad., 398.

* There is some mistake here. The decision in *Lakshmappa* v. *Ramava* was given and was reported in 1875. The previous decisions in *Mahalsabai* v. *Vithoba* (7 Bom. H. C. Rep., Appx., p. xxvi) given by Ainslie, C. J., and Gibbs and Forbes, JJ., and which was overruled by the decision in *Lakshmappa* v. *Ramava*,

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held that, assuming that a man's only son may be given in adoption by himself, yet, if he has not expressly given to his widow an authority to make such a gift, it cannot be implied by law. Now the power of a widow to *give or take* an adoption differs in different schools of Hindu law. Their Lordships are not retrying this Bombay decision. In Madras it is established that unless there is some express prohibition by the husband, the wife's power, at least with concurrence of sapindas in cases when that is required, is co-extensive with that of the husband. That is certainly the simplest rule, and it seems to their Lordships most consistent with principle. The distinction taken by Westropp, C. J., appears to have been quite novel, and also at variance with a decision by his predecessor Sir Michael (? Matthew) Sausse. There may be some peculiarity in the school of law which prevails in Bombay to support it, though it has not been brought to their Lordships' notice" In the present case no consent of sapindas was required: Yeknath was a separated Hindu. If, then, the principle to be followed in such a case in Bombay is that, in the absence of express prohibition by the husband, the widow's power to give or take in adoption is co-extensive with that of the husband, it is possible that some expressions in previous decisions of this Court regarding this important question will require modification.

I know of no peculiarity in the school of law which prevails in Bombay cutting down the widow's power to give or take in adoption. On the contrary, as Mr. Mayne says, (Hindu Law and Usage, § 118), in Western India the widow's power of adoption is even greater than in Southern India. As their Lordships in the Privy Council said in *Sri Raghunadha* v. *Sri Brozo Kishoro* [1], the law of Madras is something intermediate between the stricter law of Bengal and the wider law of Bombay.

In *Vithoba* v. *Bapu* [2] I had occasion to trace the development in the Bombay Presidency of the law regarding the right of a

was given in 1862 and was reported in the volume of 1870. So, too, the decision in *Bayabai* v. *Bala* (7 Bom. H.C. Rep., Appx., p. i.) in which Westropp, J., differing from Tucker and Warden, JJ., doubted whether, according to the Maratha School, a widow can adopt without the express authority of her husband given prior to his decease, was given in 1866 and was reported in the volume of 1870.

(1) (1870) 3 I. A. 154, 191.

(2) (1899) 15 Bom., 110 at pp. 118-125.

widow, not having the permission of her husband, to adopt a son. The tendency of later decisions has been in the direction of still further development. For instance, to take the question of a widow's motives in taking a son in adoption: the development of the law in force in this Presidency may be traced through the cases of *Patel Vandravan* v. *Patel Manilal* [1]; *Mahableshvar* v. *Durgabai* [2]; *Bhimawa* v. *Sangawa* [3]; while now we have the ruling of our Full Bench—*Ramchandra* v. *Mulji* [4]—that a widow in this Presidency having the power to adopt, and a religious benefit being caused to the deceased husband by the adoption, any discussion of her motives in making the adoption is irrelevant.

This disposes of the last shred of an objection which might possibly be raised to the adoption in the present case. I have no doubt that the plaintiff's claim to set aside the adoption should be dismissed, and I would do so, setting aside the decrees of the lower Courts with all costs on plaintiffs.

Decree reversed and suit dismissed.

(1) (1890) 15 Bom., 565.
(2) (1896) 22 Bom., 199.
(3) (1896) 22 Bom., 206
(4) (1896) 22 Bom., 558

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ADMINISTRATOR GENERAL—*Administrator General's Act (II of 1874). Sections 17 and 18—Order to collect assets—Decree against deceased's estate passed prior to such order—Attachment of part of debt sued for subsequently to such order—Claim of Administrator General prior to that of attaching creditor.* On the 16th April 1898, the plaintiff obtained an *ex parte* decree against the defendant as heir and legal representative of his deceased father. Previously to the date of the decree (*viz.*, on 4th March, 1898), an order had been made by the High Court under sections 17 and 18 of the Administrator General's Act (II of 1874), authorizing the Administrator General to collect the assets of the deceased and ordering him, if necessary, to take out letters of administration to his estate. On the 20th April 1898, the plaintiff under section 268 of the Civil Procedure Code (Act XIV of 1882) attached certain money in the hands of a third party due to the deceased's estate. On the 2nd July 1898, letters of administration were granted to the Administrator General.

Held that, as against the Administrator General, the attachment was void *ab initio*. At the date of the decree obtained by the plaintiff, the Administrator General was

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entitled by virtue of the High Court's order to take possession of the estate of the deceased. As soon as that order was made, his right to possession became paramount and excluded that of the defendant (the son of deceased), who was then no longer entitled to recover payment of debts due to his father. A decree, therefore, subsequently obtained against the defendant could not, as against the Administrator General, confer any rights on the decree-holder, who could not stand in a better position than the defendant, his judgment-debtor. Under sections 278 and 280 of the Civil Procedure Code, the Administrator General had the right to have the attachment removed, because he was exclusively entitled, at first by reason of the order under section 18 of Act II of 1874 and subsequently by his letters of administration, to recover the debt, and was not subject to any decree which affected his title.

Lalchand v. *Gumtibai* (1871) 8 Bom. H. C. Rep. 140) distinguished

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ADOPTION—*Adoption by a daughter-in-law of A—after the estate has vested in A's widow—Permission by A to adopt—Non-consent of widow—Divesting of estate once vested—Widow's authority to adopt in Bombay—Daughter-in-law must have permission—Co-widows—Adoption by one co-widow—Adoption of a son older than adoptive mother—Hindu law.*] An adoption cannot divest a person of an estate which has once vested in him, unless such adoption is made with his consent. An exception to this rule is where a co-widow adopts. Such an adoption will divest the younger widow of her estate. Another exception is where a daughter-in-law adopts with the authority of her father-in-law, who is head of the family, as in *Vithoba* v. *Bapu* (1890) 15 Bom., 110).

Unless prohibited expressly or by implication, a widow in the Presidency of Bombay has authority to adopt, but a daughter-in-law, *i.e.*, the widow of a pre-deceased son, must be specially authorized by her father-in-law in order that she may make a valid adoption binding as against the heirs of her father-in-law.

Sakubai was the widow of Balkrishna, who died in 1877 in the life-time of his father Raghunath. Fourteen years later, *viz.*, in 1891, Raghu died, leaving a widow Saibai, who succeeded to his estate as his heir. In March 1892, Sakubai adopted the plaintiff Gopal, who was older than herself, as son to her husband, alleging that she had Raghu's permission to do so. The plaintiff sued for a declaration that as adopted son of Balkrishna he was entitled to succeed as heir to the property of Raghu, as against the defendant Vishnu, who claimed to have been adopted by Saibai as son to Raghu. The lower appellate Court disallowed the plaintiff's adoption on the grounds (1) that Saibai had not consented to it, and (2) that the plaintiff was older than his adoptive mother Sakubai.

Held (confirming the decree of the lower Court), that as the adoption of the plaintiff Gopal was made by Sakubai without proper authority and without Saibai's consent, it was inoperative and invalid. As Saibai did not give her consent to the plaintiff's adoption, that adoption did not divest her of her exclusive right to succeed as heir of Raghu.

Semble—The fact that an adopted son is older than the adopting mother does not make his adoption invalid. The rule prescribing a difference of age in favour of the adopting mother is only directory and not mandatory.

Gopal v. Vishnu 250

———*Adoption by senior widow—Widow's capacity to adopt—Implied prohibition—Hindu law.*] In the absence of express prohibition the husband's consent to an adoption by his widow is always to be implied.

The question of implied prohibition is one of legal inference from the facts found, and it is open to the Court to inquire into its correctness in second appeal.

Semble—In the Bombay Presidency the widow's right to adopt is inherent and not merely delegated.

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Held.—In the absence of express prohibition by the husband, the widow's power to give or take in adoption is co-extensive with that of the husband.

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ADOPTION—*Adoption by widow out of estate vested in co-widow on the death of the last male owner—Adoption must be by widow of the last owner—Express or implied permission of husband—Hindu law.*] By Hindu law as settled by judicial decisions, it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and a person in whom the estate does not vest cannot make a valid adoption so as to divest (without their consent) third persons of rights the estate has vested of their proprietary rights.

To this rule there are four exceptions:—

1. In the case of co-widows. Though on the death of the husband without male issue, the estate vests in all his widows, it has been held that he elder widow can, by adopting a son with the express or implied permission of her husband, divest the co-widow or widows of their vested rights. The consent of such younger widows has not been held to be necessary.

2. In the case of a mother who succeeds as heir to an unmarried son, legitimate or adopted, who dies after his father. In such a case the right of the widow to take a son in adoption to her husband has been conceded to her, though such a son cannot properly be described as being the heir of the last full owner.

3. When an adoption takes place with the full assent of the party in whom the estate has vested by inheritance, the adoption is validated by such consent.

4. Where there has been ratification by conduct or acquiescence.

Per PARSONS, J.:—The mere fact that the adopting widow is not the widow of the last male holder would not make an adopting by her spiritually invalid, while any difficulty as to the inheritance and the estate is cured by the assent to the adoption given by the person in whom that inheritance or estate is vested.

One Bhimappa died in 1878, leaving a widow Umava and daughter-in-law Sarasvati him surviving. His only son Darigavde, the husband of Sarasvati, had predeceased him. On Bhimappa's death his estate vested in his widow Umava. In 1879 Sarasvati with Umava's consent adopted a son Shentapa (defendant No. 3). The plaintiff in this suit sued to recover certain land which formed part of Bhimappa's estate, alleging that it had been given to him by Umava. The first defendant alleged and proved that he had bought the land from the third defendant (Shentapa), who was the adopted son of Sarasvati.

Held (dismissing the suit), that the adoption was valid, and that the first defendant was entitled to the land.

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———*Gift conditional on adoption—Condition precedent—Direction to adopt given to the widow of the testator's deceased son, not carried out—Bequest of residuary property—Condition precedent not fulfilled—Hindu law—Will—Construction.*] The will of a childless testator directed that the widow of his deceased son should adopt a boy, then aged nine years, who was the son of the testator's nephew. To this boy the testator bequeathed his residuary estate to be made over to him at the age of twenty-one years. The widow, having refused to adopt him, died while he was still a minor without having done so.

During her life the question arose whether this bequest was to take effect only upon the condition that the adoption should have taken place, or was a legacy validly made in his favour, as a person designated, without the adoption having been carried out.

In 1887, before the death of the widow, a suit for the construction of the will was decided to the effect that the adoption was a condition precedent to the minor's

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taking the legacy. A review of that judgment was refused when, after coming of age in 1891, he applied for it. His application to be allowed to appeal from that judgment was, however, granted, the circumstances being deemed by the appellate Court to [illegible] the delay within section 5 of the Limitation Act (XV of 1877).

The High Court (Pigot and Ameer Ali, JJ.) dismissed the appeal and affirmed the decision of the Judicial Committee of the Privy Council,

Held, [illegible] of the High Court, that the adoption was a condition [illegible] and that the [illegible] adoption could not take under the will.
Krishna Behari Ghose and Sarda 271

ADOPTION—*Validity of—Evidence—Proof—Proof of—whether natural mother alive or dead—Onus of proof—Presumption—Evidence Act (I of 1872), Sections 107, 108—Person not heard from for seven years—Presumption of death.*
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ADVERSE POSSESSION *Limitation—Presumption—Service lands—Mere non-payment of services—Conduct necessary to make the holding adverse.*] Where lands are held [illegible] on condition of rendering services, the fact that no services have been performed does not of itself [illegible] the tenure. To make the holding adverse there must be a refusal to perform services required in order to hold the lands free of service.
Bommireddi v. Thimmi 602

APPEAL—*Appeal to High Court—Objections to decree filed by plaintiff—Subsequent withdrawal of appeal—Application by plaintiff for leave to appeal—Sufficient cause—Limitation Act (XV of 1877), Sch. II, Art. 156—Civil Procedure Code (Act XIV of 1882), Sections 561—Practice.*] The appellants (defendants) filed an appeal against the decree passed in this case on the 30th August 1898, and on the same day gave notice thereof to the respondents (plaintiffs), who on the 28th September 1898, filed cross-objections to the decree under section 561 of the Civil Procedure Code (Act XIV of 1882). On the 2nd March 1899, the appellants gave notice to the respondents that they would not proceed with the appeal. The respondents then applied to be allowed to appeal, alleging that they had from the first intended to appeal, but had not done so only because the other side had filed an appeal. That being so, they had merely filed cross-objections.

Held, that the application should be granted. It appeared that the applicants had intended to appeal and would have appealed, but for the fact that an appeal in the suit was already on the file. Under these circumstances the applicants showed sufficient cause for not filing their appeal within section 5 of the Limitation Act (XV of 1877), and were, therefore, not barred by limitation.
Bhagwandas v. Jayaroo 692

——— ———*Death of, after presentation of appeal—Abatement—Guardians and Wards Act (VIII of 1890), Sections 7 (3), 3 (a) and 43—Claim to guardianship based on a will dependent upon right to claim under a representative.*
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——— ———*Limitation Act (XV of 1877), Sch. II, Art. 182—Civil Procedure Code (Act XIV of 1882), Sections 205—Date of judgment—Date of decree—Difference between the two—Time requisite for obtaining copy of the decree—Time between pronouncement of judgment and signing of the decree—Practice—Limitation.*
See Limitation 442

——— ———*Practice—Appeal from a decree in the nature of an award—Case referred to the decision of a Court, both parties agreeing to abide by such decision.*

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Where both parties to a suit referred the matters in dispute between them to the Court, and agreed to abide by its decision, and the Court passed a decree awarding a certain sum to the plaintiff.

Held, that no appeal lay from the decree, the decision of the Court being in the nature of an arbitrator's award.

SAYAD ZAIN v. KALABHAI 752

APPEAL *Practice—Valuation—Court Fees Act (VII of 1870), Sec. 7, Cl. 10 (a), Cl. 4 (c), (d); Sec. 12—Class to which a suit belongs—Decision as to such class.*

See VALUATION 480

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See CRIMINAL PROCEDURE CODE, 1898 493

ARBITRATION—*Order of reference to arbitration—Civil Procedure Code (Act XIV of 1882), Sec. 506—Jurisdiction—Absence of written authority to refer—Practice.*] By a Judge's order (consented to by the plaintiff and defendant this suit was referred to arbitration on the 15th December 1898. In the following January and February two meetings were held before the arbitrator which were attended by the defendant and the manager-clerk of her then attorney, and he took an active part in the proceedings. Subsequently the defendant changed his attorney and declined to proceed with the arbitration, contending that the order of reference was illegal, inasmuch as no special authority in writing was given by the parties to their attorneys to refer the suit to arbitration as required by section 508 of the Civil Procedure Code (Act XIV of 1882). She therefore applied to set aside the order.

Held, (dismissing the application) that the absence of a written authority did not invalidate the order of reference.

TAX[illegible] 629

BHAGDAR—*Bhagdar in the [illegible] Bombay Act V of 1862, Sec. 3—Alienation of the whole of share—Subsequent suit to recover share—Limitation—Limitation Act XV of 1877.* The plaintiff was a co-sharer in a bhág, alienated his share to a stranger. In the year 1882 the Collector declared the alienation to be illegal, and in the year 1887 ordered that the plaintiff should be reinstated in the possession of his share. At plaintiff's request his share was given into the possession of the defendant who was the plaintiff's brother and khatedár of the entire bhág. In the year 1892 the plaintiff brought this suit against the defendant to recover possession of his share. The defendant contended that the suit was time-barred, the plaintiff not having been in possession since the year 1871.

Held, that the suit was not barred, the possession of plaintiff's alienee being the possession of the plaintiff himself, and the defendant not being entitled to tack to the period of his own possession that of the plaintiff's alienee.

MAHAMAD DAST[illegible] v. AVADI 710

BOMBAY—*Town of Bombay limits of—Mortgage—Transfer of Property Act (IV of 1882) Sec. 69.*

See MORTGAGE; TRANSFER OF PROPERTY ACT 348

BURIAL, *right of—Easement—Customary rights—Custom of burial—Local custom—Right claimed by a certain section of Mahomedans to bury their dead in a certain locality—Right of burial.*] Where a certain section of the Mahomedan community had been for many years in the habit of burying their dead near a dargá in plaintiff's land, and the plaintiff sued for an injunction restraining them from exercising this right in future,

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Held, that the right of burial claimed by the defendants was not an easement, but a customary right, which being confined to a limited class of persons and a limited area of land, was sufficiently certain and reasonable to be recognized as a valid local custom.
MOHIDIN *v.* SHIVLINGAPPA ... ... 66(

CASES :—

Abdul Aziz, In re (I. L. R., 14 All., 49) followed.
See CRIMINAL PROCEDURE CODE 32

Berdan v. *Greenwood* ((1880), 20 Ch D., 764, foot note 3) followed.
See PRACTICE 626

Daintry, In re ((1893) 2 Q B, 116).
See LIMITATION 177

Dharmodas Das v. *Nittanni Dasi* ((1887) 14 Cal., 446) followed.
See HINDU LAW 231

Dinonath Mullik v. *Girija* (I. L. R, 12 Cal., 133) followed.
See CRIMINAL PROCEDURE CODE 32

Hem Chunder v. *Thalo Moni Debi* ((1893) 20 Cal, 533) approved.
See PARTITION 385

Imperatrix v. *Nathu Haracharl* (Cr. Ref. 35 of 1891) distinguished.
See MUNICIPALITY 416

Iyyappa v *Ramkrishnayya* ((1890) 13 Mad, 519) referred to.
See SPECIFIC RELIEF ACT 375

Jai Narayan Rai v. *Queen-Empress* ((1890) 17 Cal., 962) dissented from.
See CRIMINAL PROCEDURE CODE 221

Jai Prakash Lal, In re (I. L. R., 6 All, 26) followed.
See CRIMINAL PROCEDURE CODE 32

Lalchand v. *Gumtibai* (1871) 8 Bom., H. C. Rep., 140) distinguished.
See ADMINISTRATOR GENERAL 428

Mangal Sen v. *Rup Chand* ((1891) 13 All., 321) dissented from.
See CIVIL PROCEDURE CODE 382

Martand v *Dhondo* ((1897) 22 Bom., 621) distinguished.
See MORTGAGE 119

Mohima Chunder v. *Nobin Chunder* ((1895) 23 Calc., 149) dissented from.
See LIMITATION 243

Morice v. *The Bishop of Durham* ((1804), 9 Ves 399) referred to and followed.
See WILL 725

Municipality of Ahmedabad v. *Juma Punja* ((1891) 17 Bom., 731) distinguished.
See MUNICIPALITY 446

Pandurang v. *Bhaskar* (11 Bom. H. C. R., 72) distinguished.
See PARTITION 137

Queen-Empress v. *Engadu* (I. L. R., 11 Mad., 98) followed.
See CRIMINAL PROCEDURE CODE 32

Queen-Empress v. *Ishri* ((1894) 17 All, 67) distinguished.
See CRIMINAL PROCEDURE CODE 439

Queen-Empress v. *Visram Babaji* ((1896, 21 Bom., 495) followed.
See CRIMINAL PROCEDURE CODE 221

Rahi v. *Govinda* ((1879) Bom., 97) doubted.
See HINDU LAW 257

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Repealed Act—Repeal of Repealing Act—Revival of Repealed Act—Effect of such revival.
See CIVIL PROCEDURE CODE 82

Pitambar v. Bapu (I. L. R. 13 Bom. 11)
See HINDU LAW 250

CASTE QUESTION—*Excommunication—Caste question—Decision of caste question by caste-fellows—Effect of the order of excommunication—Suit for declaration of right—Cognizance of such suit by Civil Courts—Jurisdiction of Civil Courts.*
See JURISDICTION 122

CHARITY—*Hindu temple, with endowments and property attached to it—Public, religious and charitable trust—Civil Procedure Code (Act XIV of 1882), Sec. 539—Trustee—Constructive trustee—His liability—Right to sue—Limitation.*
See CIVIL PROCEDURE CODE 659

CHARTER-PARTY—*Bill of lading—Freight—Rate of freight in charter-party—Contract by sub-charterer with shipper for freight at lower rate—Refused by captain to sign bills of lading at lower rate than rate in charter-party—Payment by shipper of difference under protest—Ship.*
See SHIPPING 551

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 13 AND 13—*Practice—Partition—Two suits for partition—First suit for partition of family property—Second suit for partition of property held jointly by family and others—Vritti.*]
See PARTITION 597

———SEC. 16, PROVISO AND 57—*Relief to be obtained by personal obedience of defendants—Property situate outside the jurisdiction of the Court in which the suit is filed—Practice—Procedure—Jurisdiction.*

The proviso to section 16 of the Civil Procedure Code (Act XIV of 1882) requires not only that the relief sought should be entirely obtainable through the personal obedience of the defendant, but also that the defendant should reside within the jurisdiction of the Court in which the suit is filed.

Held, therefore, that a suit for the determination of an interest in immoveable property, filed in a Court within the jurisdiction of which the property is not situate, did not lie in that Court as all the defendants did not reside within the jurisdiction of that Court, even though the relief sought could have been obtained through their personal obedience.

Held, also, that in such a case the Judge ought not to dismiss the suit, but return the plaint to be presented to the proper Court under section 57 of the Civil Procedure Code.

ISAK *v.* KHATIJA 756

———SEC. 25—*Court of Small Causes"—Meaning of the expression—A Court invested with Small Cause Court powers not a Small Cause Court within the section—Appeal.* The expression "Court of Small Causes" in the last clause of section 25 of the Code of Civil Procedure (Act XIV of 1882) means a Court properly and strictly so called and does not include a Court invested with the jurisdiction of a Court of Small Causes.

Mangal Sen v. *Rup Chand* ((1891) 13 All., 324) dissented from.

RAMCHANDRA *v.* GANESH 382

———SECS. 36, 37, 100, 102, 103—*Decree—Ex parte decree—Appearance of party—Appearance by pleader or recognized agent—Appearance only for purpose of applying for adjournment—Civil Procedure Code (Act XIV of 1882), Secs. 36, 37, 100, 102, 103,—Presidency*

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Small Cause Courts Act (XV of 1882), Sec. 38—Dismissal for default—Remedy of plaintiff—Practice—Procedure. A suit and cross suit between the same parties were on the board for hearing on the 23rd April, 1898. On that day A, the counsel who was instructed for the defendants in the first suit and for the plaintiffs in the second, was unable to attend, and B, another counsel, held his brief and appeared on his behalf and applied for two months' adjournment of both suits. The mamlatdar of his clients was then in Court. B was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused and B said he withdrew from the case. Both suits were then and there disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed for non-appearance. On the 7th May following, an application was made for a re-hearing of both suits. The Court, regarding the decrees, as *ex parte* decrees, granted a rule for a new trial which was made absolute. On appeal to the Full Court the matter was referred to the High Court.

Held, that under the circumstances the suits were to be considered as having been disposed of under sections 100 and 102 of the Civil Procedure Code (Act XIV of 1882) respectively, and that whether or not they, or either of them, fell within the category of contested suits as defined by section 38 of the Presidency Small Cause Courts Act (XV of 1882), the remedy under section 103 of the Civil Procedure Code was open to the plaintiffs in the cross-suit.

Where, on the day fixed for hearing, a party is present in person merely for the purpose of applying for an adjournment which is refused, he must be taken to have "appeared" within the meaning of Chapter VII of the Civil Procedure Code. The party has appeared in person. The purpose for which he appeared, or the action which he took on appearance, are immaterial.

But where the party is absent and an application for adjournment is made on his behalf by a pleader who has no other instructions and whose functions are at an end when the adjournment is refused, in that case the party has not appeared within the meaning of the chapter.

Where the pleader who applies for an adjournment is accompanied by a recognized agent of the party, but the latter neither makes any application, nor does any act, the question is whether he *intends* to appear and in fact does appear for the party in the exercise of his powers under section 36 of the Civil Procedure Code. That section is merely permissive and enabling. If the recognized agent although able to do so does not think proper to conduct the case on behalf of his principal, his mere presence in Court is not an "appearance" in the suit. An appearance may be made by a pleader or a recognized agent: but the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented.

Section 38 of the Presidency Small Cause Courts Act (XV of 1882), does not preclude a plaintiff whose suit has been dismissed for default from applying under section 103 of the Civil Procedure Code (Act XIV of 1882), to have the order of dismissal set aside. There is no inconsistency between the two sections. A plaintiff whose suit has been dismissed for default has two separate remedies under different enactments. If he chooses to apply for a new trial under section 38, he must do so within eight days. If he prefers to apply for an order setting aside the dismissal under section 103 of the Civil Procedure Code, he can do so within thirty days (Limitation Act XV of 1877, Schedule II, Art. 163.)

SOONDERLAL *v.* GOORPRASAD 414

CIVIL PROCEDURE CODE (XIV OF 1882), SEC. 43—*Practice—Partition—Two suits for partition—First suit for partition of family property—Second suit for partition of property held jointly by family and others—Vitiil.*

See PARTITION 597

SEC. 108—*Small Cause Court—Exparte decree—Satisfaction of the decree—Application by defendant to set aside*

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The fact that an *ex parte* decree had been satisfied, does not disentitle a ... applying to the Court to set it aside under Section 108 of the Civil ... Act XIV of 1882).

... v. BISSONAUTH 716

... CODE ACT XIV OF 1882, SEC. 120—*Refusal of a plaintiff* ... A plaintiff who was represented by a pleader was summoned ... to attend the Court and to give evidence on his be... fixed for final hearing. The plaintiff refused to attend, on the ... was a person of rank and was exempted from personal appearance ... of a Native State. The first Court, considering the personal appear... the plaintiff necessary, issued an order under section 120 of the Civil ... Code (Act XIV of 1882) that he should attend, and, on his failure to ... a decree against him. On appeal, the Judge reversed the decree and ... the case for trial.

Held confirming the order of remand, that the order and decree of the first ... were not illegal, as the plaintiff having appeared by a pleader, the Court ... power to issue an order under section 120, unless the pleader had refused ... to answer a material question.

... v. HANMANRAO 318

... SEC. 231—*Application for execu... ... Order refusing to allow execution by one ... Appeal—Practice.*] No appeal lies against an ... or. 231 of the Code of Civil Procedure (Act XIV of 1882), refus... of several joint decree-holders to execute a joint decree.

... SHAH v. BALUBAI 623

... SEC. 214—*Res judicata—Suit by ... will—Will held valid and ... Decree in suit for mesne profits ... for execution ... Question raised.*] A obtained ... B for possession of certain land, and then died. Thereupon C ... the heir of A, alleging that A, relying upon a will ... A had instituted a suit to recover Rs. 110 as ... proceedings were stayed till after the ... In this suit B contended that the will ... A was not of sound disposing mind ... The Subordinate Judge found ... and decreed for mesne profits. This decree ... by the District Judge.

... the decision of this suit, the Subordinate Judge took up C's application ... original decree obtained by A. This application was resisted ... on various grounds on which he had decided the suit for mesne profits. ... the validity of the will on the grounds of non-execution by, and ... of mind of, the testator. The Subordinate Judge held that the ... was *res judicata*; he, therefore, overruled this objection, and ordered ... The District Judge held that as the suit for mesne profits ... the nature of a Small Cause suit, in which there was no second appeal, ... passed in that suit did not operate as *res judicata* in the present ... proceedings. He, therefore, reversed the Subordinate Judge's order ... the case for a fresh decision.

Held, reversing the remand order, that the question whether C was entitled to execute the decree as A's representative fell within the last clause of section 214 of the Code of Civil Procedure (Act XIV of 1882). The Subordinate Judge, who had raised an issue as to the validity of the will relied upon by C in the suit for mesne profits, was entitled to act upon his determination of that issue in the ... proceedings.

... v. NARANSHANKAR 53

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CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 244, 258—*Agreement not to execute decree—Execution—Breach of contract—Suit to recover damages.*] The provisions of section 244 of the Civil Procedure Code (Act XIV of 1882) are no bar to a suit to recover damages for breach of a contract not to execute a decree.
HANMANT *v.* SUBBABHAT 394

——SECS. 244, 278 TO 283—*Questions arising between the decree-holder and the representatives of the judgment-debtor—Claims to attached property where representative judgment-debtor claims to hold the attached property as trustee of third party—Execution of decree.*] The plaintiffs sued for a declaration that certain property was liable to be attached in execution of a decree obtained by them in Suit No. 591 of 1888 against the estate of one Gulaya, deceased, who had been the head of a *math* situate in the Dhárwár District. The property had been attached in execution, but the defendant, who was Gulaya's successor in office, had obtained the removal of the attachment on the ground that the property belonged to the *math* and not to Gulaya personally, and was not, therefore, liable to satisfy the decree. The plaintiffs thereupon brought this suit. The lower appellate Court passed a decree for the plaintiffs and granted the declaration. On second appeal it was contended that under section 244 of the Civil Procedure Code (Act XIV of 1882), the question ought to have been decided in execution of the decree in Suit No. 591 of 1888, and that a separate suit would not lie.

Held, on the merits, that the decree of the lower appeal Court should be reversed and the suit dismissed.

Per RANADE, J.:—Where the representative of a judgment-debtor puts forward a personal claim to property which is attached as assets of the judgment-debtor in his hands, the investigation of the claim must be made in execution under the provisions of section 244 of the Code of Civil Procedure (Act XIV of 1882). But where he asserts that he holds the property in trust for, or on behalf of, or as manager of some third person or body of persons, or of a religious charity or institution, the claim must be investigated under the provisions of sections 278 to 283, and the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit.

Per PARSONS, J.:—Sections 278 to 283 of the Code of Civil Procedure have no reference to any claim preferred or objection made by any person who is on the record as a party to the suit. Whenever a question arises between the representative of a judgment-debtor on the record (whether originally sued as such or added before or after decree) and the decree-holder as to whether property in the hands of the representative was of the assets of the deceased or not, that question must be determined by order of the Court executing the decree under the provisions of section 244.
MURIGEYA *v.* HAYAT SAHEB 237

——SECS. 214, 310A, 311 AND 320—*Limitation—Limitation Act (XV of 1877), Sec. 14—Decree—Execution by Collector—Application to Collector to set aside sale.*] A decree passed against the applicant Narayan was transferred for execution to the Collector under section 320 of the Civil Procedure Code (Act XIV of 1882). On the 8th May 1897, the Collector in execution sold certain property, belonging to the applicant, which was purchased by the respondents. On the 17th May 1897, the applicant applied to the Collector to set aside the sale on the ground of alleged irregularities, and the Collector having referred the matter to the Mámlatdár for report, forwarded the record to the Court on 30th July 1897. On the 6th August 1897, the applicant, fearing that he had not applied to the proper Court, applied to the Subordinate Judge to set aside the sale, framing his application both under section 310A and section 311 of the Civil Procedure Code. He contended that, under section 14 of the Limitation Act his application was not barred.

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Held, that the application was barred by limitation. Under the rules made by the Government of Bombay under section 220 of the Civil Procedure Code, the Collector had no jurisdiction. There was, therefore, no *bona fide* mistake of jurisdiction such as would justify the Court in excluding the time occupied in applying to the Collector from the period of limitation.

Under the rules made by the Local Government of the Bombay Presidency, a Collector has not the power of the Court, under section 311 of the Civil Procedure Code, to set aside a sale.

No second appeal lies from an order made under section 311 of the Civil Procedure Code.

NARAYAN *v.* RUKHMIN 531

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 274—*Execution of decree—Agreement between judgment-debtor and person other than the judgment-debtor—Payment into Court*. The provisions of section 274 of the Civil Procedure Code (Act XIV of 1882) do not embrace within their scope an agreement between a judgment-debtor and a person other than the judgment-debtor, whereby such person, in consideration of the postponement of the execution of the decree against the judgment-debtor, undertakes to pay to the judgment-creditor a certain sum of money. Such agreements are therefore, enforceable although made without the sanction of the Court.

KESU *v.* GENU 502

SEC. 274—*Attachment of interest under will—Will—Construction—Bequest to wife with obligation of maintaining and educating children—Interest taken under such bequest—Decree against wife—Fraudulent conveyance—Transfer of Property Act (IV of 1882), Section 53.*

See WILL 1

SECS. 278—283—*Attachment of same property in execution of decrees obtained by different creditors—Claim made in one suit to attached property under section 278—Order passed under section 281—Suit by claimant to establish right—All attaching creditors made defendants to suit—Parties—Practice—Civil Procedure Code (Act XIV of 1882), Sec. 28—Small Cause Court—Jurisdiction—Declaratory decree*. The first and second defendants obtained a decree in Suit No. 1518 of 1897 against Rundhordas, described as the owner of the Wahalan Mills, and attached property on the mill premises. Twelve other creditors also brought twelve other similar suits and obtained decrees against other persons who were also described as owner of the Wahalan Mills, and attached the same property. In Suit No. 1515 of 1897, Raghunath Mukund (the present plaintiff) under section 278 of the Civil Procedure Code (Act XIV of 1882) claimed the property. His claim was disallowed, and he was ordered to bring a suit under section 283. No claim or order was made in the case of the other twelve suits. Raghunath now sued in pursuance of the above order to recover his property, and he included as defendants not merely those (defendants Nos. 1 and 2) who had been plaintiffs in Suit No. 1518 of 1897, but also those who had been plaintiffs in the twelve other suits, and who had attached the property in execution of their decrees. It was objected that no suit would lie against the latter, as in their suits no claim had been made to the goods which they had attached and no order made under section 281 of the Civil Procedure Code (Act XIV of 1882).

Held (1) that the suit lay against the defendants (other than Nos. 1 and 2), although no claim had been made or order passed under section 281 of the Civil Procedure Code. The summary remedy given by section 278 of the Civil Procedure Code (Act XIV of 1882) is alternative to the remedy by way of suit. The object of section 278 is not to deprive a claimant of his remedy by suit, but to give him, if he is diligent, a more speedy and summary remedy.

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(2) That the Court of Small Causes had jurisdiction to try the suit. In substance the suit was a suit for goods, though as a matter of form the decree might contain a declaration. A suit for the release of goods wrongfully seized is not a declaratory suit under section 42 of the Specific Relief Act (I of 1877).

(3) That although the value of the property claimed by the plaintiff was admittedly over Rs. 2,000, the Court of Small Causes had jurisdiction. The plaintiff was entitled to abandon part of his claim.

(4) That the plaintiff might join in one suit as defendants persons who had decrees against different persons. The right to relief was in respect of the same matter and, therefore, fulfilled the requirements of section 28 of the Civil Procedure Code, 1882.

RAGHUNATH MUKUND *v.* SAROSH K. R. KAMA 266

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 287—*Execution—Sale in execution subject to mortgage—Suit to set aside sale and for re-sale of property free from mortgage—Practice—Procedure.*] The plaintiff, having sold property in execution of a decree subject to a certain mortgage lien which had been duly investigated and allowed, brought this suit to have the sale set aside and praying for a re-sale of the property free from the mortgage lien.

Held, that he was not entitled to the relief sought. His proper remedy was to have brought a suit for a declaration that the alleged mortgage was null and void, and to have stayed the sale till the determination of that suit.

PARSHOTAM *v.* GANESH 759

——————————SEC. 305—*Sanction under section* 305—*Guardians and Wards Act* (*VIII of* 1890), *Secs.* 29 *and* 30—*Act XX of* 1864—*Guardian—Certificated guardian—Mortgage by such guardian without Court's permission—Validity of such mortgage.*

See GUARDIAN 287

——————————SEC. 310A—*Act V of* 1894—*Execution sale—"Person whose immoveable property has been sold"—Prior private purchaser of property sold in execution not within the section.*] A person who has purchased property which is afterwards sold in execution of a decree obtained against his vendor, is not entitled under section 310A of the Civil Procedure Code (Act XIV of 1882) to have the execution sale set aside.

RAMCHANDRA *v.* RAKHMABAI 450

——————————SEC. 310A—*Right to apply under the section—Ownership of land—Vendor and purchaser—Effect of contract of sale—Transfer of Property Act* (*IV of* 1882), *Sec.* 54.] A person who has contracted to purchase land, or an interest in land, does not by such contract become the owner, in equity, of such land or such interest (section 54 of the Transfer of Property Act IV of 1882). He has a personal right against his vendor or the assignee with notice of his vendor to compel the latter by a suit for specific performance to perform his contract: but he has no direct right over the land.

Held, accordingly, that a person who had contracted to purchase certain land which was subject to mortgage, and was sold in execution by the mortgagee, was not the owner of the land and was, therefore, not entitled to apply to set aside the sale under section 310A of the Civil Procedure Code (Act XIV of 1882).

MAHADEV *v.* VASUDEV J. KIRTIKAR 181

——————————SEC. 310A AS AMENDED BY ACT V OF 1894—*Actual receipt of sale-proceeds by decree-holder necessary to set aside a sale—Sale in execution of a decree.*] The words in clause (*b*) of section 310A of the Code of Civil Procedure as amended by Act V of 1894—"less any amount

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which may, since the date of such proclamation or sale, have been *received* by the decree-holder"—contemplate an actual receipt of the amount by the decree-holder. A mere payment of the sale proceeds into Court does not satisfy the requirements of the section.

A proclamation of sale ordered that for the recovery of Rs. 843-9-9 certain immoveable property belonging to the judgment-debtor should be sold in two lots, A and B. Lot A was sold for Rs. 725, and on the next day lot B was sold for Rs. 584. The judgment-debtor deposited into Court Rs. 452 13-0, and applied to have the sale of lot B set aside, alleging that he had purchased lot A through a third party, and that the sale proceeds had been paid into Court.

Held, that the mere payment of the sale proceeds into Court was not a sufficient compliance with the requirement of section 310A of the Code of Civil Procedure, and as it had not been shown that the sale proceeds had been received by the decree-holder, the sale could not be set aside.

THAKAR v. RAGHUNATH 723

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 440—*Guardian—Right to sue—Lunatic—Guardian of the person of a lunatic not competent to sue in respect of the lunatic's estate.*

See LUNATIC 403

———SEC. 462—*Decree—Suit on behalf of minor—Compromise of decree by next friend—Application to set aside compromise—Mode of impeaching the decree—Practice—Procedure—Minor.*

See MINOR 620

———SEC. 506—*Arbitration—Order of reference to arbitration—Jurisdiction—Absence of written authority to refer—Practice.*] By a Judge's order consented to by the plaintiff and defendant this suit was referred to arbitration on the 13th December, 1898. In the following January and February two meetings were held before the arbitrator which were attended by the defendant and the managing clerk of his then attorney, and he took an active part in the proceedings. Subsequently the defendant changed his attorney and declined to proceed with the arbitration, contending that the order of reference was illegal, inasmuch as no special authority in writing was given by the parties to their attorneys to obtain the order, as required by section 506 of the Civil Procedure Code (Act XIV of 1882). He took out a summons to set aside the order.

Held (dismissing the summons) that the absence of a written authority did not invalidate the order of reference.

LUXUMIBAI v. HAJEE WIDINA CASSUM 629

———SEC. 539—*Public, religious and charitable trust—Charity—Hindu temple, with a dharmshala and sadavart attached to it—Trustee—Construction trustee—His liability—Right to sue—Limitation.*] A Hindu built a temple in honour of the deity Shri Pandurang, to which were attched a *dharmshala* and a *sadavart* for feeding travellers and giving alms to the poor. For the maintenance of the temple and the charities connected with it, he dedicated certain property by a deed of gift, under which he constituted himself a trustee for life and appointed a *panch* to act as his successors in the trust. During his life-time he managed the temple as provided in the deed. On his death in 1867, the *panch* did not take charge, but his son (the defendant) assumed the management. The temple was open to the Hindu community.

In 1894 the *pujari* of the temple and five other worshippers of the idol filed this suit under section 539 of the Code of Civil Procedure (Act XIV of 1882) with the sanction of the Advocate General, for removing the defendant from the management of the temple on the ground of his misconduct and mismanagement of the trust property.

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The defendant pleaded (*inter alia*) that the property was not a public, religious and charitable trust: that he was not a trustee: that the plaintiffs had no right to sue, and that the suit was time-barred.

Held, (1) that having regard to the fact that a certain number of the public had always used the temple, that there was attached to it a *dharmshálá* and that the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadávart*, the intention of the founder was to devote the property to public, religious and charitable purposes;

(2) that although the defendant was not appointed a trustee, yet by taking charge of the endowment, and purporting to manage it as temple property, he made himself a constructive trustee, and was liable, as such, to the beneficiaries;

(3) that the plaintiffs were entitled to maintain the suit under section 539 of the Code of Civil Procedure (Act XIV of 1882);

(4) that the suit was not time-barred, as with every fresh breach of the constructive trust, or whenever the direction of the Court was deemed necessary, a fresh cause of action arose.

JUGALKISHORE *v.* LAKSHMANDAS 659

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 561—*Practice—Appeal by defendants—Objections to decree filed by plaintiff—Subsequent withdrawal of appeal—Application by plaintiff for leave to appeal—Sufficient cause—Limitation Act (XV of 1877), Sec. 5.*

See PRACTICE 692

COMMISSION—*Application by a defendant (caveator) to examine witnesses on commission—Civil Procedure Code (Act XIV of 1882), Chap. XXV—Practice.*] Where a defendant (caveator) applied for the issue of a commission to examine witnesses, the Judge having regard to the circumstances of the case and to the principles laid down in *Berdan* v. *Greenwood* ((1880) 20 Ch. D., 764, foot-note 3) refused the application.

MOWJI *v.* NEMCHAND 626

COMPANY—*Transfer of shares—Approval of transfer by directors—Such power of approval a fiduciary power—Resolution of directors to approve of future transfers ultra vires.*] By the articles of association of the New Great Eastern Spinning and Weaving Company transfers of shares in the Company were subject to the approval of the directors. On the 18th October, 1898, the directors passed a resolution "that up to the time of the next ordinary general meeting the board approve of all transfers of shares made by Dwarkadas Shamji and Ramdas Kessowji (two of the shareholders) or either of them, and ..... will transfer shares standing in the name of Dwarkadas Shamji and in the name of Ramdas Kessowji to their or his transferees without claiming any lien or raising any objection."

Held, that the above resolution was *ultra vires* and not binding on the company. The power conferred on the directors by the articles of association was a fiduciary power to be exercised for the benefit of the company, and could not be exercised until the question of each transfer together with the names of the transferor and the transferee was before them and they had an opportunity of considering each case.

IN RE NEW GREAT EASTERN SPINNING AND WEAVING COMPANY ... 685

COMPROMISE *of decree by next friend—Application to set aside compromise—Modes of impeaching the decree—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), Sec. 462—Minor—Suit on behalf of minor—Decree.*] Where a decree to which a minor is a party has been compromised with leave of the Court granted under section 462 of the Civil Procedure Code (Act XIV of 1882), the compromise cannot be subsequently re-opened by the Court *proprio motu* on the ground that it gave the minor less property than he was entitled to under the

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decree. The modes in which such an order can be impeached are, at the most, two, namely, by review or by suit.
VIRUPARSHAPPA *v.* SHIDAPPA 620

CONFESSION—*Confession not signed by the accused—Admissibility of such confession—Evidence—Parol evidence admissible to prove the terms of the confession—Criminal Procedure Code (Act X of 1882), Sec. 533.*
See EVIDENCE 221

———*Retracted confessions—Admissibility of such confessions without corroborative evidence—Evidence—Criminal Procedure.*
See CRIMINAL PROCEDURE 316

CONVEYANCE—*Fraudulent conveyance—Conveyance by plaintiff to defeat creditors—Subsequent suit by plaintiff to recover possession.*
See FRAUD 406

CO-SHARER—*Mortgage by co-sharer of undivided share—Partition suit subsequently brought by other co-sharer to which mortgagee not a party—Mortgaged property allotted to a sharer other than mortgagor—Rights of such co-sharer—Partition re-opened—Fraud of mortgagor and mortgagee—Partition.*
See PARTITION 385

COSTS—SECURITY FOR COSTS—*Infant female plaintiff—Civil Procedure Code (Act XIV of 1882), Sec. 380—Practice.*] Unless in exceptional cases, neither an infant female plaintiff nor her next friend ought to be required to give security for costs.
BAI POREBAI *v.* DLVJI MLGHJI 100

CRIMINAL PROCEDURE—*Judge's charge—Misdirection—Confessions—Retracted confessions—Admissibility of such confessions without corroborative evidence—Evidence.*] The accused were tried for murder. The Sessions Judge in his charge to the jury discussed the evidence generally, describing it as very poor evidence which, standing alone, amounted to nothing. He also told the jury that, as regards retracted confessions, "the law is that you are to look for corroboration in independent evidence. If that supplies such corroboration that you can confidently say, 'the confessions must be absolutely true,' you can act upon them, otherwise not."

Held, that the charge was defective. The Sessions Judge ought to have summed up the evidence to the jury calling their attention to the material parts of it, and leaving them to form their own opinion on it, instead of treating it generally.

Held, also, that the Judge had misdirected the jury, as there is no rule of law that a retracted confession cannot be treated as evidence unless it is corroborated in material particulars by independent reliable evidence.
QUEEN-EMPRESS *v.* GANGIA 316

CRIMINAL PROCEDURE CODE (ACT X OF 1882), SECS. 107, 167 AND 344—*Remand of prisoners in police custody—Security to keep the peace—Magistrate's power to demand such security from persons residing beyond his local jurisdiction.*] Under section 167 of the Code of Criminal Procedure (Act X of 1882) the period for which a Magistrate can authorize the detention of the accused in police custody is fifteen days on the whole, including one or more remands.

A Magistrate cannot call upon a person residing beyond his local jurisdiction to give security against a breach of the peace within that jurisdiction.

In re Jai Prakash Lal (I. L. R., 6 All., 26), *In re Abdul Aziz* (I. L. R., 11 All., 49), *In re Rajendro Chunder Roy* (I. L. R., 11 Cal., 737), *Dinonath Mullik*

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v. *Girija* (I. L. R., 12 Cal., 133), and *Queen-Empress* v. *Engadu* (I. L. R., 11 Mad., 98) followed.
IN RE KRISHNAJI P. JOGLEKAR 32

CRIMINAL PROCEDURE CODE (ACT X OF 1882), SECS. 195, 369—*Sanction to prosecute—Revision—Session Judge's power to review his order in proceedings taken to revoke sanction.*] A Sessions Judge, having once refused to revoke a sanction granted by a Subordinate Court under section 195 of the Criminal Procedure Code (Act X of 1882), has no jurisdiction afterwards to review his order and set aside the sanction.

An application to a Sessions Judge for revocation of a sanction granted under section 195 of the Code is a criminal proceeding in revision. Any order passed in such a proceeding is final, and cannot be reviewed or revised by him.
QUEEN-EMPRESS *v.* GANESH 50

——SEC. 423—*Appellate Court—Powers of appellate Court to enhance sentence—Sentence—Alteration of sentence.*] The accused was convicted of criminal breach of trust and sentenced to nine months' rigorous imprisonment. On appeal, the conviction was upheld, but the sentence was altered to one of six months' rigorous imprisonment and a fine of Rs. 1,000, or, in default of payment, three months' further rigorous imprisonment. The accused applied to the High Court in revision, contending that the alteration of the sentence amounted to an enhancement of the sentence beyond the powers of the appellate Court under section 423 of the Code of Criminal Procedure (Act X of 1882).

Held, that there was no enhancement of the sentence.

Queen-Empress v. *Ishri* ((1894), 17 All., 67) distinguished.
QUEEN-EMPRESS *v.* CHAGAN JAGANNATH 439

——SEC. 188—*Maintenance—Husband and wife—Maintenance order obtained by a wife against husband—Subsequent decree for restitution of conjugal rights obtained by husband—Effect of such decree on previous order of maintenance.*] A decree of a civil Court for restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance, if the wife should persist in refusing to live with her husband. A Magistrate ought to cancel a previous order of maintenance made by him, or rather treat it as determined, if the wife failing to comply with the decree for restitution refuses to live with her husband.
IN RE BULAKIDAS 481

——SECS. 522, 523, 524—*Order to restore possession of immoveable property.*] An order made under section 522 of the Criminal Procedure Code (Act X of 1882) restoring possession of immoveable property to a person who has been dispossessed of it by criminal force, is an independent order and may be made subsequently to the date of the conviction of the offender. It need not be made at the same time as the conviction.

The case contemplated by section 522 is that of a person in possession (the complainant) being dispossessed by force by another person (the accused) and the latter being in possession at the date of conviction. In such a case the section gives the Magistrate power to order possession to be restored to the complainant. In the case of a proper order, third persons could not be affected; if they are, the order is not thereby necessarily invalid. Clause 2 of the section gives them a remedy by civil suit.

On 27th September, 1897, complainant charged one Ravlo with criminal trespass under section 447 of the Indian Penal Code (Act XLV of 1860). He alleged that in the previous July Ravlo had entered into possession of the land

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and sowed rice upon it, and that when in the month of September, 1897, he (the complainant) went to the field, Ravlo had turned him out by force and refused to vacate the land. On the 17th November, 1897, the case was heard by the Third Class Magistrate, who convicted Ravlo of the offence charged.

On the following day (18th November 1897) the complainant applied to the Magistrate under section 522 of the Code of Criminal Procedure (Act X of 1882) to be restored to possession of the land and of the standing crops. The Magistrate ordered possession of the land to be restored to the complainant, but attached the crops under Chapter XLIII of the Criminal Procedure Code.

Thereupon one Visaji intervened and claimed the crops as having been sown by himself. His claim was disallowed, and the crops were ordered to be sold and the proceeds credited to Government under sections 523 and 524 of the Code.

Held, that the order made by the Magistrate under section 522 restoring possession of the land to the complainant was bad, because it did not appear that the offence of which the accused were convicted was attended with criminal force, and that the dispossession was due to the use of such force. The illegal entry complained of had taken place in July, 1897. The accused then took possession, and in September, being then still in possession, forcibly resisted the complainant when he attempted to enter upon the land. The complainant, however, did not charge the accused with this assault, but with the trespass which had taken place in July. It is only when the criminal use of criminal force leads to dispossession that an order under section 522 can be made.

Held, also, that the order passed under sections 523 and 524 with reference to the crops were illegal. The crops were not property in respect of which the offence was committed, nor were they used in the commission of the offence. They were not such property as is referred to in section 517, 523 or 524 of the Criminal Procedure Code.

Held, also, that the Third Class Magistrate, as such, had no authority to make an order under section 524.

NARAYAN *v.* VISAJI 494

CRIMINAL PROCEDURE CODE (ACT X OF 1882), SEC. 533—*Confession—Confession not signed by the accused—Admissibility of such confession—Parol evidence admissible to prove the terms of the confession.*] Section 533 of the Code of Criminal Procedure (Act X of 1882) is intended to apply to all cases in which the directions of the law have not been fully complied with. It applies to omissions to comply with the law as well as to infractions of the law.

Queen-Empress v. *Vyram Babaji* (1896) 21 Bom., 194 followed.

Jai Narayan Rai v. *Queen-Empress* (1890) 17 Cal., 862 dissented from.

The accused was charged with murder. At the trial a confession made by him before the committing Magistrate was tendered in evidence against him. The Sessions Judge rejected the confession as inadmissible, as it did not bear the mark or signature of the accused, and, as there was no other reliable evidence to bring home the charge to the accused, he was acquitted.

Held, reversing the order of acquittal, that though the record of the confession was inadmissible, parol evidence could be given of the terms of the confession, and those terms, when proved, might be admitted and used as evidence against the accused under section 533 of the Code of Criminal Procedure (Act X of 1882). The accused was, therefore, ordered to be retried.

QUEEN-EMPRESS *v.* RAGHU 221

———————(ACT V OF 1898), SEC. 35—*Conviction of several offences at one trial—One sentence only to be passed in such cases—Sentence—Indian Penal Code (Act XLV of 1860), Sec. 71.*] Where a person commits house-breaking in order to commit theft, and theft, he may be charged

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with, and convicted of, each of these offences. In awarding punishment under the provisions of section 71 of the Indian Penal Code (Act XLV of 1860) the Court should pass one sentence for either of the offences in question and not a separate one for each offence.

If in such a case two sentences are passed, and the aggregate of these does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, that would be an irregularity, and not an illegality, calling for the interference of a Court Appeal or Revision.

QUEEN-EMPRESS *v.* MALU AND QUEEN-EMPRESS *v.* NAGU 706

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECS. 269, CL. 3, AND 307 —*Jury—Trial by jury of an offence triable with the aid of assessors—Practice.*] The accused was tried by a jury on four charges: (1) forgery, (2) using a forged document, (3) criminal misappropriation, and (4) attempting to use a forged document as genuine. The jury returned a unanimous verdict of "not guilty" on all the charges. The Sessions Judge agreed with the jury in their verdict on the 1st, 2nd and 4th charges, but he differed from them on the 3rd charge, which was criminal misappropriation. This offence was not triable by a jury and ought, therefore, under clause 3 of section 269 of the Criminal Procedure Code (Act V of 1898), to have been tried by the Sessions Judge with the aid of the jurors as assessors. Nevertheless the Judge took the verdict of the jury upon this charge, and differing from it, referred the case to the High Court under section 307 of the Code.

Held, that although the procedure of the Sessions Judge was irregular, the trial by jury must be accepted as legal, and the case as one that could be referred to the High Court under section 307 of the Criminal Procedure Code.

QUEEN-EMPRESS *v.* JIVRAM HARIBHAI 696

———————————SEC. 337—*Pardon tendered to one of the accused—Approver—Trial of approver for non-fulfilment of the condition on which pardon was offered—Practice.*] No action can be taken against a person who has accepted a pardon for breach of the condition on which the pardon was tendered until after the case in the Court of Session has been finished, and then his trial should be commenced *de novo*.

QUEEN-EMPRESS *v.* PHAU 493

———————————SEC. 342, CL. 4—*Evidence Act (I of 1872), Sec. 132—Practice—Procedure—Witness—Accused person calling as witnesses other accused persons charged with him and awaiting a separate trial for same offence.*

See PRACTICE 213

———————————SEC. 557—*Pleader—Appointment of a pleader to act as Presidency Magistrate—Appointment not forbidden by the Code.*] The appointment of a pleader to act as a Magistrate is not forbidden by section 557 or any other provision of the Code of Criminal Procedure (Act V of 1898).

After the Criminal Procedure Code of 1898 had come into force, a practising pleader was appointed to act as a Presidency Magistrate. On his appointment he gave up practising and was not practising at the time the accused was tried and convicted by him of theft. The accused applied to the High Court, in revision, to quash the conviction, on the ground that the appointment of the Magistrate contravened the provisions of section 557 of the Code of Criminal Procedure.

Held, that section 557 of the Code does not deal with appointments, and had no application to the present case, as the Magistrate was not practising at the time the accused was tried and convicted.

IN RE JIVANJI ADAMJI 41

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DEATH—*Presumption of—Evidence—Evidence Act (I of 1872), Secs. 107 and 108—Person not heard of for seven years.*
See EVIDENCE 296

DECREE—*Administrator General—Administrator General's Act (II of 1874), Secs. 17 and 18—Order to collect assets—Decree against deceased's estate passed prior to such order—Attachment of part of deceased's estate subsequently to above order—Claim of Administrator General prior to that of attaching creditor.*
See ADMINISTRATOR GENERAL 423

———*Civil Procedure Code (Act XIV of 1882), Sec. 206—Decree not according to law—Substantial failure of justice—Interference under extraordinary jurisdiction.*
See SMALL CAUSE COURT 334

———*Civil Procedure Code (Act XIV of 1882), Sec. 231—Application for execution by one of several joint decree-holders—Appeal—Practice.*
See EXECUTION 623

———*Ex-parte decree—Appearance of party—Appearance by pleader or recognized agent—Appearance only for purpose of applying for adjournment—Civil Procedure Code (Act XIV of 1882), Secs. 36, 37, 100, 102, 103—Presidency Small Cause Court Act (XV of 1882), Sec. 38—Dismissal for default—Remedy of plaintiff—Practice—Procedure.*] A suit and cross-suit between the same parties were on the board for hearing on the 23rd April, 1898. On that day A, the counsel who was instructed for the defendants in the first suit and for the plaintiffs in the second, was unable to attend, and B, another counsel, held his brief and appeared on his behalf and applied for two months' adjournment of both suits. The munim of his clients was then in Court. B was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused and B said he withdrew from the case. Both suits were then and there disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed for non-appearance. On the 7th May following, an application was made for a re-hearing of both suits. The Court, regarding the decrees as *ex parte* decrees, granted a rule for a new trial which was made absolute. On appeal to the Full Court the matter was referred to the High Court.

Held, that under the circumstances the suits were to be considered as having been disposed of under sections 100 and 102 of the Civil Procedure Code (Act XIV of 1882) respectively, and that whether or not they, or either of them, fell within the category of contested suits as defined by section 38 of the Presidency Small Cause Courts Act (XV of 1882), the remedy under section 103 of the Civil Procedure Code was open to the plaintiffs in the cross suit.

Where on the day fixed for hearing a party is present in person merely for the purpose of applying for an adjournment which is refused, he must be taken to have "appeared" within the meaning of Chapter VII of the Civil Procedure Code. The party has appeared in person. The purpose for which he appeared, or the action which he took on appearance, are immaterial.

But where the party is absent and an application for adjournment is made on his behalf by a pleader who has no other instructions, and whose functions are at an end when the adjournment is refused, in that case the party has not appeared within the meaning of the chapter.

Where the pleader who applies for an adjournment is accompanied by a recognized agent of the party, but the latter neither makes any application, nor does any act, the question is whether he *intends* to appear and in fact does appear for the party in the exercise of his powers under section 36 of the Civil Procedure Code. That section is merely permissive and enabling. If the recognized agent

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although able to do so does not think proper to conduct the case on behalf of his principal, his mere presence in Court is not an "appearance" in the suit. An appearance may be made by a pleader or a recognized agent: but the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented.

Section 38 of the Presidency Small Cause Courts Act (XV of 1882) does not preclude a plaintiff whose suit has been dismissed for default from applying under section 103 of the Civil Procedure Code (Act XIV of 1882), to have the order of dismissal set aside. There is no inconsistency between the two sections. A plaintiff whose suit has been dismissed for default has two separate remedies under different enactments. If he chooses to apply for a new trial under section 38, he must do so within eight days. If he prefers to apply for an order setting aside the dismissal under section 103 of the Civil Procedure Code, he can do so within thirty days (Limitation Act XV of 1877, Schedule II, Art. 163).

SOONDERLAL *v.* GOORPRASAD... 414

DECREE—*Ex-parte decree—Civil Procedure Code (Act XIV of* 1882), *Sec.* 108—*Small Cause Court—Satisfaction of the decree—Application by defendant to set aside decree.*] The fact that an *ex-parte* decree has been satisfied, does not disentitle a defendant from applying to the Court to set it aside under section 108 of the Civil Procedure Code (Act XIV of 1882)

ZENDOOLAL *v.* KISHORILAL 716

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SECS. 3 (2), 53 AND 73—*Agriculturist—Plaintiff proved or admitted to be an agriculturist—Appeal—Special Judge—Jurisdiction.*] The plaintiff alleging that she was an agriculturist sued for redemption under Chapter II of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The Subordinate Judge raised an issue as to her status, and on that issue found that she was not an agriculturist. He, however, proceeded with the trial of the case and on the merits dismissed her claim. She thereupon applied to the Special Judge, who took up the case in revision, reversed the decree of the lower Court, and passed a decree in the plaintiff's favour, holding that she was an agriculturist.

Held, that the Special Judge had no jurisdiction. The Subordinate Judge had found that the plaintiff was not an agriculturist. Having done so it must be deemed that he went on with the trial only in his ordinary jurisdiction, and the decree passed was one not under Chapter II of the Dekkhan Agriculturists' Relief Act, but under the general provisions of the Civil Procedure Code (Act XIV of 1882). By section 53 the Special Judge has jurisdiction only over decisions and orders passed by a Subordinate Judge under Chapter II.

Per PARSONS, J.—It is only when the plaintiff is admitted and proved (not merely when he claims) to be an agriculturist that the Court has jurisdiction to try a suit under Chapter II of the Act. The question of status ought to be raised and decided as a preliminary issue.

LAKSHMAN *v.* RAMCHANDRA 321

———————————————————————————————SEC. 11—*Civil Procedure Code (Act XIV of* 1882), *Sec.* 57—*Jurisdiction—Practice—Procedure when suit filed in wrong Court.*] Under section 11 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), a suit in which there are several defendants who are agriculturists may be instituted and tried in a Court within the local limits of whose jurisdiction any one of such defendants resides and not elsewhere.

Where a suit was brought in the Court at Haveli, the plaintiffs alleging that some of the defendants who held lands within the jurisdiction of that Court were agriculturists, and the suit was dismissed because those defendants were found not to be agriculturists.

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Held, that the proper procedure to be adopted in such a case was not to dismiss the suit, but to return the plaint for presentation to the proper Court.

LADHAJI *v.* HARI 679

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII of 1879) SEC. 44—*Agreement filed under section and becoming a decree Default in payment of instalments due under decree—Application to make decree absolute under Section 89 of Transfer of Property Act (IV of 1882,—Limitation Act (XV of 1877, Sch. II, Art. 179.*] On the 21st October 1891, the plaintiff and the defendant entered into an amicable agreement before a conciliator for payment of a mortgage debt due to the former by annual instalments. The agreement was forwarded to the Court on the 21st December 1891, to be filed under section 44 of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879). Default having been made in the payment of the instalments, the first of which became due on the 25th January, 1895, and which also was not paid, the plaintiff applied for execution by sale of the mortgaged property. The application was made on the 6th September, 1897, and it was struck off the file for some formal defect on the 18th November 1897. Subsequently on the 10th October 1898, the plaintiff, having applied for an order absolute for sale under section 89 of the Transfer of Property Act (IV of 1882), questions arose as to the applicability of the section to agreements filed in Court under section 44 of the Dekkhan Agriculturists' Relief Act and as to limitation.

Held, that (1) agreements filed under section 44 of the Dekkhan Agriculturists' Relief Act, if relating to sale of mortgaged property, are subject to the provisions of section 89 of the Transfer of Property Act (IV of 1882).

(2) Article 179, Schedule II, of the Limitation Act (XV of 1877) applies to applications under section 89 of the Transfer of Property Act.

Held, further, that in the present case the application of September 1897 should be treated as a step in aid of execution.

BHAGAWAN *v.* GANU 644

DHARAM—*Bequest for Dharam—Limitation—Limitation Act (XV of 1877), Secs. 10 and 28, Arts. 120, 141 and 144—Will—Hindu Law.*

See WILL 725

DIVORCE—*Husband and wife—Indian Divorce Act (IV of 1869), Secs. 17 and—20—Decree for nullity of marriage—Confirmation by the High Court—Time of confirmation—Practice—Procedure.*] Under the Indian Divorce Act (IV of 1869) a decree for nullity of marriage made by a District Court cannot be confirmed by the High Court before the expiration of six months from the pronouncing thereof.

A. *v.* B. 460

EASEMENT—*Customary rights—Custom of burial—Local custom—Right claimed by a certain section of Mahomedans to bury their dead on a certain locality—Right of burial.*] Where a certain section of the Mahomedan community had been for many years in the habit of burying their dead near a dargá in plaintiff's land, and the plaintiff sued for an injunction restraining them from exercising this right in future.

Held, that the right of burial claimed by the defendants was not an easement, but a customary right, which being confined to a limited class of persons and a limited area of land, was sufficiently certain and reasonable to be recognized as a valid local custom.

MOHIDIN *v.* SHIVLINGAPPA 666

——*Indian Easement Act (V of 1882), Secs. 4 and 52—Right of growing rice plants in another's land to be afterwards transplanted to his own—Licence.*] A 'licence' as defined by section 52 of the Indian Easement Act (V of 1882) is not, as in the case of an 'easement,' connected with the ownership of any land, but creates only a personal right or obligation. License rights are not generally transferable, and the transferee is not bound to continue the license granted by the former owner, while easements once established follow the property.

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The plaintiff claimed and proved a prescriptive right of using certain land belonging to the defendant's mortgagor for a part of every year for raising rice plants to be afterwards transplanted to his own land.

Held, that the right was clearly enjoyed by the plaintiff as owner of some land to which the young rice plants were transplanted, and that such a right, so attached to plaintiff's land, was not a license but an easement of the nature of *profits a prendre*.

SUNDRABAI *v.* JAYAWANT 397

EASEMENT—*Right of way—Change of use—Indian Easements Act (V of 1882), Sec. 23—Increase of servitude*] Under section 23 of the Indian Easements Act (V of 1882) a right of way enjoyed for agricultural purposes may be used for the purposes of a factory, provided no additional burden is thereby imposed on the servient heritage.

JESANG *v.* WHITTLE 595

EVIDENCE—*Confession—Confession not signed by the accused—Admissibility of such confession—Parol evidence admissible to prove the terms of the confession—Criminal Procedure Code (Act X of 1882), Sec. 533.*]

The accused was charged with murder. At the trial a confession made by him before the Committing Magistrate was tendered in evidence against him. The Sessions Judge rejected the confession as inadmissible, as it did not bear the mark or signature of the accused, and, as there was no other reliable evidence to bring home the charge to the accused, he was acquitted.

Held, reversing the order of acquittal, that though the record of the confession was inadmissible, parol evidence could be given of the terms of the confession, and those terms, when proved, might be admitted and used as evidence against the accused under section 533 of the Code of Criminal Procedure (Act X of 1882). The accused was, therefore, ordered to be retried.

QUEEN-EMPRESS *v.* RAGHU 221

———*Confessions—Retracted confessions—Admissibility of such confessions without corroborative evidence—Criminal Procedure.*

See CRIMINAL PROCEDURE 316

———*Evidence Act (I of 1872), Sec. 32, Cls. (2) and (3)—Deed—Recitals in deed—Description of boundary—Statement against pecuniary or proprietary interest*] The plaintiff sued in 1893 to recover possession of certain land. The defendants denied the plaintiff's title. The plaintiff tendered in evidence a registered mortgage-deed of adjacent land executed in 1877, which set forth the boundaries of the land comprised in the mortgage, and as one of such boundaries referred to the land in question as then belonging to the plaintiff. At the date of the deed there was no litigation existing between the present litigants, and at the date of the present suit the mortgagor was dead.

Held, that the statement in the deed was admissible under clause 3 of section 32 of the Evidence Act (I of 1872) as a statement against the pecuniary or proprietary interest of the mortgagor.

NINGAWA *v.* BHARMAPPA 63

———*Indian Evidence Act (I of 1872), Secs. 107 and 108—Person not heard of for seven years—Presumption of death—Adoption—Validity of adoption depending on whether natural son alive or dead—Onus of proof—Deed or will conferring estate on a person described as adopted son—Res judicata—Former decree in favour of plaintiff, but issue as to adoption found against him—No appeal open to plaintiff against that finding.*] Death is to be presumed after a certain interval (seven years); but there is no presumption as to the time of death. If, therefore, any one has to establish the precise period during these seven years at which a person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor, on the other, upon the conti-

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nuance of life. There is no presumption of law that because a person was alive in 1877, therefore he was alive in 1878.

One Shankar died in September, 1878, leaving a widow Bhagubai. The year before his death his only son (Bala), a child of eight years old, had left his home and was never heard of again. A few days before his death, Shankar adopted the plaintiff (his nephew) and executed a deed of adoption, which stated that he had no hope that his son Bala was alive, and that he had, therefore, adopted the plaintiff. The deed further declared the plaintiff to be the owner of all Shankar's property with all the rights of a natural son, but provided that, in the event of the lost son returning, he should have half. In 1882 the plaintiff as Shankar's adopted son brought this suit to recover some of Shankar's property, which was in the hands of the defendants, who claimed it as Shankar's heirs. They (*inter alia*) impeached the plaintiff's adoption.

Held that, in order to recover the property as the adopted son of Shankar, it lay on the plaintiff to prove a valid adoption. It was a condition precedent to prove that, at the date of the adoption, Shankar was without a son. It was, therefore, for the plaintiff to prove that Bala was then dead. There was at that time, no presumption that Bala was dead, and there being no evidence on the point it was impossible to say when he died, or consequently that the adoption was valid.

Held, however, that plaintiff was entitled to succeed as donee under the deed of adoption (Exhibit A). It was clearly Shankar's intention to give the estate to the plaintiff as being his adopted son. But if the adoption was invalid, the gift had no effect. The *onus* here was on the defendants. It was for them to show that Bala was at that date alive and the adoption, therefore, invalid. That burden they had not discharged, and the plaintiff, therefore, was entitled to a decree.

Per FARRAN, C. J.:—Where a deed of gift or will confers an estate upon a named person, because he fills or by reason of his filling a certain character, he is entitled to recover the estate without affirmatively proving that he fills such character. The *onus* of proving that he does not fill the character, which is the reason of the gift, lies upon those who dispute his claim. The whole question is one of *onus* of proof.

The plaintiff had previously sued one Krishnaji, the father of the defendants, in another suit (No. 804 of 1885) to recover certain other lands. In that suit it had been held that the plaintiff was not the adopted son of Shankar, but that nevertheless he was entitled to recover the lands sued for, on the strength of the above-stated deed (Exhibit A), and a decree was passed for the plaintiff.

Held that the issue as to adoption in that suit was not *res judicata* in the present suit. In the former suit the plaintiff recovered upon the deed. He could not have appealed from the decree which was in his favour, nor could he under the Civil Procedure Code (Act XIV of 1882) appeal from the finding upon the adoption issue which was against him. Upon that issue there had not been a final decision.

RANGO BALAJI *v.* MUDIYEPPA 296

VIDENCE ACT (I OF 1872), SEC. 92, PROVISO 4—*Mortgage—Power of sale—Suit to set aside sale under power of sale—Promise by mortgagee to postpone sale—Evidence of such promise admissible.*

See MORTGAGE 348

XECUTION—*Agreement not to execute decree—Breach of contract—Suit to recover damages—Civil Procedure Code (Act XIV of 1882), Secs. 214, 258—Decree.*

See CIVIL PROCEDURE CODE 394

——*Civil Procedure Code (Act XIV of 1882), Sec. 231—Application for execution by one of several joint decree-holders—Order refusing to allow execution by one of several joint decree-holders—Appeal—Practice.*] No appeal lies against an order under section 231 of the Code of Civil Procedure (Act XIV of 1882), refusing to allow one of several joint decree-holders to execute a joint decree.

RATANLAL *v.* BAI GULAB 623

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EXECUTION *Civil Procedure Code (Act XIV of* 1882), *Secs.* 278—283—*Attachment of same property in execution of decrees obtained by different creditors—Claim made in one suit to attached property under section* 278—*Order made under section* 281—*Suit by claimant to establish right—All attaching creditors made defendants to suit—Parties—Civil Procedure Code (Act XIV of* 1882), *Sec.* 28—*Small Cause Court—Declaratory decree—Jurisdiction.*

See CIVIL PROCEDURE CODE 266

———*Civil Procedure Code (XIV of* 1882), SEC. 310A—*Act V of* 1894—*Execution sale—"Person whose immoveable property has been sold"—Prior private purchaser of property sold in execution not within the section.*

See CIVIL PROCEDURE CODE 450

———*Execution by Collector—Application to Collector to set aside sale—Civil Procedure Code (Act XIV of* 1882), *Secs.* 214, 310A. 311 *and* 320—*Limitation—Limitation Act (XV of* 1877), *Sec.* 14—*Decree.*

See LIMITATION 531

———*Execution of decree—Agreement between a judgment-creditor and a person other than judgment-debtor—Postponement of execution—Civil Procedure Code (Act XIV of* 1882), *Sec.* 257*A.*

See CIVIL PROCEDURE CODE 502

———*Sale in execution subject to mortgage—Suit to set aside sale and for re-sale of property free from mortgage—Practice—Procedure—Civil Procedure Code (Act XIV of* 1882), *Sec.* 287.] The plaintiff, having sold property in execution of a decree subject to a certain mortgage lien which had been duly investigated and allowed, brought this suit to have the sale set aside and praying for a re-sale of the property free from the mortgage lien.

Held, that he was not entitled to the relief sought. His proper remedy was to have brought a suit for a declaration that the alleged mortgage was null and void, and to have stayed the sale till the determination of that suit.

PARSHOTAM *v.* GANESH 759

———*Surety—Limitation Act (XV of* 1877), *Sch. II, Art.* 179, *Expl. I—Liability of surety in execution—Application for execution against a surety when a step in aid of execution against a principal—Mode of enforcing payment against a surety—Practice—Procedure.*

See SURETY 478

EXECUTOR, POWER OF SALE OF—*Probate and Administration Act (V of* 1881), *Sec.* 90, *as amended by Act VI of* 1889, *Sec.* 14.] Section 90 of the Probate and Administration Act V of 1881 as amended by Act VI of 1889, section 14, gives an executor merely the ordinary powers of sale that an ordinary owner would have in so far as they are not limited by the will, and as such, those powers are subject to the usual rules of equity.

PHERI BEHARILALJI *v.* BAI RAJBAI 342

FAMILY ARRANGEMENT—*Limitation—Hindu Law—Partition—Son born after partition—Right of such son to partition—Share of such son—Family arrangement—Limitation.*] In the year 1875 one Venkatrav having at that time three sons, *viz.*, defendants Nos. 1, 2 and 3, divided his property, allotting one-third to the first defendant and retaining the remaining two-thirds in his own possession in the interest of his other two sons (defendants Nos. 2 and 3), who were then minors. The latter continued to live with him, and he managed the property. The first defendant was the son of Venkatrav's elder wife and the second and third defendants were the sons of his younger wife. In 1880 the plaintiff was born and in 1894 he brought this suit by his mother (the younger wife) as next friend for a partition of the whole of Venkatrav's property, including that which in 1875 had been allotted to the first defendant. The plaintiff claimed a fourth share.

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Held, that the plaintiff was not entitled to any part of the property which had been given to the first defendant in 1875. The family arrangement then made had been acquiesced in for more than twelve years and could not be disturbed. The plaintiff could only claim against defendants Nos. 2 and 3, who lived with their father in union and with whom the plaintiff himself had lived as member of a joint family.

GANPAT *v.* GOPALRAO 636

FRAUD—*Fraudulent conveyance—Conveyance by plaintiff to defeat creditors—Subsequent suit by plaintiff to recover possession.*] When property has been conveyed by the owner to another person with the object of defrauding his (the owner's) creditors, and the fraud has been carried out, the owner cannot succeed in a suit to recover possession.

HONAPA *v.* NARSAPA 406

FRAUDULENT CONVEYANCE—*Transfer of Property Act (IV of* 1882), *Sec. 53—Will—Construction—Bequest to wife with obligation of maintaining and educating children—Interest taken under such bequest—Decree against wife—Attachment of interest under will—Civil Procedure Code (Act XIV of* 1882), *Sec.* 274.

See WILL 1

FREIGHT—*Rate of freight in charter-party—Contract by sub-charterer with shipper for freight at lower rate—Refusal by Captain to sign bills of lading at lower rate than rate in charter party—Payment by shipper of difference under protest—Shipping—Charter party—Bill of lading.*

See SHIPPING 551

GIFT—*Gift conditional on adoption—Condition precedent—Direction to adopt given to the widow of the testator's deceased son not carried out—Bequest of residuary property—Condition precedent not fulfilled—Hindu Law—Will—Construction.*

See HINDU LAW; ADOPTION 271

———*Gift if not perfected by possession is invalid—Delivery of possession—Possession—Registration—Mahomedan Law.*] Under the Mahomedan law a registered deed of gift is not valid if it is never perfected by possession.

The Mahomedan law requires that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession to the donee.

Registration is not equivalent to possession.

ISMAL *v.* RAMJI 682

———*Gift of movable property—Delivery of possession not necessary if deed of gift be registered—Transfer of Property Act (IV of* 1882), *Secs.* 123, 129—*Registration—Hindu Law.*] The rule of Hindu law, that delivery of possession is essential to complete a gift, is abrogated by section 123 of the Transfer of Property Act (IV of 1882).

Dharmodas Das v. *Nistarini Dasi* ((1887) 14 Cal., 416) followed.

BAI RAMBAI *v.* BAI MANI 234

———*Revocation of gift—Vritti—Gift of vritti—Validity of such gift—Compulsory alienation of vritti invalid—Private alienation not absolutely prohibited.*] When a gift is made, the donor taking all the steps in his power to give effect to it, it is complete, and he cannot revoke it by a subsequent will.

A *vritti* cannot be sold in execution of a decree. Such a compulsory alienation is not only opposed to the Hindu law and public policy, but is also against the provisions of section 266 of the Code of Civil Procedure (Act XIV of 1882). But private alienations are not absolutely prohibited. No general rule can be pleaded in such matters. The rules of succession depend upon each particular foundation or office, and in respect of it, custom and practice must govern and prevail over the text law which prohibits both partition and alienation.

RAJARAM *v.* GANESH 131

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GUARDIAN—*Certificated guardian—Mortgage by such guardian without Court's permission—Validity of such mortgage—Sanction under Civil Procedure Code (Act XIV of 1882), Sec. 305—Guardians and Wards Act (VIII of 1890), Secs. 29 and 30—Act XX of 1864.*] Anant was the owner of the property in dispute. He mortgaged it with possession to defendant No 1 in 1884. Anant died leaving an adopted son Vithal, a minor. Thereupon one Vasudev was appointed by the District Court to be guardian of the person and property of the minor under Act XX of 1864. In September, 1890, Vasudev mortgaged the same property to plaintiff with the sanction of the Subordinate Judge's Court obtained under section 305 of the Code of Civil Procedure (Act XIV of 1882). In 1895 the plaintiff as second mortgagee brought this suit to redeem the earlier mortgage of 1884.

Held, that Vasudev, as certificated guardian, had no power to mortgage the minor's property without the previous permission of the Court which had appointed him to act as guardian, and that the sanction of another Court given under section 305 of the Code of Civil Procedure (Act XIV of 1882) was not sufficient to legalize the mortgage.

Held, also, that such mortgage would have been absolutely void under Act XX of 1864, but was only voidable under section 30 of Act VIII of 1890 at the instance of any other person affected thereby.

Held, further, that defendant No. 1, the original mortgagee, was not affected by the plaintiff's mortgage, and that the only person really affected by that mortgage was Vithal, the owner of the equity of redemption, who was a necessary party to the suit.

DAPTARAM *v.* GANGARAM 237

———*Right to sue—Practice—Procedure—Lunatic—Guardian of the person of a lunatic not competent to sue in respect of the lunatic's estate—Civil Procedure Code (Act XIV of 1882), Sec. 440.*

See LUNATIC... 103

GUARDIAN AND WARDS ACT (VIII OF 1890), SECS. 7 (3), 8 (*a*), 13—*Claim to guardianship based on a will does not survive to claimant's representative—Appeal—Death of appellant pending appeal—Abatement.*] One Khashabai applied to be the guardian of the person and property of her minor son. Her application was opposed by Gangabai, the grandmother of the minor, who alleged that she had been appointed guardian by the will of the minor's father. The Judge found the will not proved, and he appointed Khashabai to be guardian. Gangabai appealed and pending the appeal she died. Gangabai's brother, one Madhavrao, thereupon applied for leave to prosecute the appeal as Gangabai's representative.

Held, refusing the application, that the appeal must abate by reason of Gangabai's death. Her appointment alleged to have been made under the will was a matter of personal preference and trust. A claim based on personal trust could not survive to her representative.

GANGABAI *v.* KHASHABAI 719

———SECS. 13, 46 AND 39—*Duty of District Court to hear all evidence—Decision based on evidence taken by a Subordinate Court illegal—Practice—Minor— uardian.*] Section 46 of the Guardians and Wards Act (VIII of 1890) does not control section 13 of the Act, so as to authorize the District Judge to dispense with the hearing of evidence by himself and transfer the whole investigation of material issues of fact to a Subordinate Court. Nor does it empower the District Judge to use the evidence taken by the Subordinate Court.

An application was made for the appointment of a guardian to the person and property of a minor. The District Court sent the application to a Subordinate Judge for inquiry and report, and issued a notice calling upon any who objected to

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the appointment of the proposed guardian to appear before the Subordinate Judge, who would hear and dispose of the objections. The whole inquiry was held before, and all the evidence was taken by, the Subordinate Judge. Upon the evidence so taken, the District Judge disposed of the application

Held, that the procedure adopted by the District Judge was illegal, and his decision based upon evidence not taken before him could not be accepted.

GANESH VITHAL *v.* KUSALAI 698

HINDU LAW—*Adoption—Adoption by a daughter-in-law of A after the estate has vested in A's widow—Permission by A to adopt—Non-consent of widow—Divesting of estate once vested—Widow's authority to adopt in Bombay—Daughter-in-law must have permission—Co-widow Adoption by one co-widow—Adoption of a son older than adoptive mother*] An adoption cannot divest a person of an estate which has once vested in him, unless such adoption is made with his consent. An exception to this rule is where a co-widow adopts Such an adoption will divest the younger widow of her estate. Another exception is where a daughter-in-law adopts with the authority of her father-in-law, who is head of the family, as in *Vithoba* v. *Bapu* (1890) 15 Bom., 110)

Unless prohibited expressly or by implication, a widow in the Presidency of Bombay has authority to adopt, but a daughter-in-law, *i.e.*, the widow of a predeceased son, must be specially authorized by her father-in-law in order that she may make a valid adoption binding as against the heirs of her father-in-law.

Sakulbai was the widow of Balkrishna, who died in 1877 in the life time of his father Raghunath Fourteen years later, *viz.*, in 1891, Raghu died, leaving a widow Saibai, who succeeded to his estate as his heir. In March 1894, Sakubai adopted the plaintiff Gopal, who was older than herself, as son to her husband, alleging that she had Raghu's permission to do so. The plaintiff sued for a declaration that as adopted son of Balkrishna he was entitled to succeed as heir to the property of Raghu, as against the defendant Vishnu, who claimed to have been adopted by Saibai as son to Raghu The lower appellate Court disallowed the plaintiff's adoption on the grounds (1) that Saibai had not consented to it, and (2) that the plaintiff was older than his adoptive mother Sakubai.

Held, (confirming the decree of the lower Court), that as the adoption of the plaintiff Gopal was made by Sakubai without proper authority and without Saibai's consent, it was inoperative and invalid. As Saibai did not give her consent to the plaintiff's adoption, that adoption did not divest her of her exclusive right to succeed as heir of Raghu.

Semble.—The fact that an adopted son is older than the adopting mother does not make his adoption invalid. The rule prescribing a difference of age in favour of the adopting mother is only directory and not mandatory.

GOPAL *v.* VISHNU 250

———*Adoption—Adoption by widow of a predeceased son—Consent of mother-in-law—Adoption must be by widow of the last full owner—Exceptions to the rule.*] By Hindu law as settled by judicial decisions, it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and a person in whom the estate does not vest, cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietary rights.

To this rule there are four exceptions :—

1. In the case of co-widows. Though, on the death of the husband without male issue, the estate vests in all his widows, it has been held that the elder widow can, by adopting a son with the express or implied permission of her husband, divest the co-widow or widows, of their vested rights. The consent of such younger widows has not been held to be essential.

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ought not to go minutely into the question of comparative poverty, yet where the difference in wealth is marked, the whole property passes to the poorest daughter.
TOTAWA v. BASAWA 229

HINDU LAW—*Jains—Gujarati Jains settled in Belgaum—Succession among Jains—Rights of illegitimate sons of a Jain—Division into four castes—Inheritance—Illegitimate sons—Ordinary Hindu law, that of Brahmins, Kshatriyas and Vaishyas—Jains mostly Vaishyas—Four divisions of Jains—Dassa Porwad caste of Jains.*] The Courts in India have always recognized the existence of four castes, *viz*, Brâhmins, Kshatriyas, Vaishyas and Shudras.

Jains are dissenters and are mostly of Vaishya origin. A Jain converted into orthodox Hindu faith returns to the caste from which he traces his first descent.

The four main divisions of Jains are: Pramar, Oswal, Agarwal and Khandewal.

Unless a special custom to the contrary be established, the ordinary Hindu law governs succession among the Jains. Ordinary Hindu law is that of the three superior castes.

Under the ordinary Hindu law, illegitimate sons do not inherit, but are only entitled to maintenance.

Held, that a Jain of the Dassa Porwad caste was governed by the general Hindu law applicable to the three regenerate castes, being, though not a Brahmin, certainly not a Shudra, but a Vaishya by origin, and having as such carried this law with him from Gujarát to the Belgaum District.

Held, therefore, that his widow was his sole heir, and that his illegitimate sons were only entitled to maintenance.

Quære—Whether even among Shudras the widow is altogether excluded from inheritance by illegitimate sons?

Rahi v. *Govinda* (1878) 1 Bom. 97, doubted.
AMBABAI v. GOVIND 257

———*Joint family—Family property—Family firm—Partnership—Partnership suit between members of joint family—Suit by one to recover the one account of the profits of a joint family firm—Injunction. Dissolution of partnership.*] A member of a joint Hindu family cannot maintain a suit for an account of the profits of a partnership which is alleged to be joint family property and an award of his share in such profits when ascertained.

This rule of Hindu law does not prevent an injunction being granted in cases in which one member of the family is prevented from taking part in the business of the firm.
GANPAT v. ANNAJI 111

———*Joint family—Manager—Debt contracted by a manager for family purposes—Decree against the managing member alone—Sale in execution of such decree—Effect of such sale.*] When a debt is incurred by a Hindu as manager of the family for family purposes, the other members of the family, though not parties to the suit, will be bound by the decree passed against him in respect of the debt; and if in execution of the decree any joint property is sold, the interest of the whole family in such property will pass by the sale.
SAKHARAM v. DEVJI 272

———*Joint family—Surety—Father's liability as surety—Liability of his sons for the debt for which he was surety.*] Ancestral property in the hands of sons is liable for a father's debt incurred as a surety.
TUKARAMBHAT v. GANGARAM 454

———*Maintenance—Maintenance of daughter-in-law—Claim of daughter-in-law against self-acquired property of her father-in-law in hands of his heirs.*] The widow of a predeceased son, who lived in union with his father, has a legal right to maintenance from her mother-in-law out of the self-acquired property of

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the father-in-law to which his widow has succeeded as his heir. A son's widow has no legal claim for maintenance against self-acquired property in the hands of her father-in-law, but when such property devolves upon his heirs, the daughter-in-law has a claim against it in their hands for maintenance if her husband had lived in union with his father.

YAMUNABAI *v.* MANU BAI 608

HINDU LAW—*Widow—Maintenance—Right of maintenance charged on property left by testator—Sale of such property in fraud of widow's right of maintenance—Right of widow as against purchaser—Transfer of Property Act (IV of 1882), Sec. 39—Executor, power of sale of—Probate and Administration Act V of 1881), Sec. 90, as amended by Act VI of 1889, Sec. 14.*] A testator, by his will, gave his widow's maintenance out of the income of his immoveable estate subject to a limited power of sale or mortgage conferred upon his executrix for a special purpose. It was found by the lower Courts that a large part of the property was sold by the executrix with the object of defeating the claim of the plaintiff, who was one of the testator's widows, and that the purchaser was aware of the fraud.

Held, that the plaintiff was entitled to recover her maintenance out of the property in the hands of the purchaser. The purchaser having been aware of the fraud, the plaintiff's right to maintenance against the property in his hands remained unaffected whether under section 39 of the Transfer of Property Act (IV of 1882) or the law previously in force and irrespective of the possibility of her claim being satisfied from other property.

Section 90 of the Probate and Administration Act V of 1881 as amended by Act VI of 1889, section 14, give an executor merely the ordinary powers of sale that an owner would have in so far as they are not limited by the will, and as such, those powers are subject to the usual rules of equity.

SHRI BEHARILALJI *v.* BAI RAJBAI 342

———————*Will—Construction—Gift conditional on adoption—Condition precedent—Direction to adopt given to the widow of the testator's deceased son, not carried out—Bequest of residuary property—Condition precedent not fulfilled.*] The will of a childless testator directed that the widow of his deceased son should adopt a boy, then aged nine years, who was the son of the testator's nephew. To this boy the testator bequeathed his residuary estate to be made over to him, at the age of twenty-one years. The widow having refused to adopt him, died while he was still a minor without having done so.

During her life the question arose whether this bequest was to take effect only upon the condition that the adoption should have taken place, or was a legacy validly made in his favour, as a person designated, without the adoption having been carried out.

In 1887, before the death of the widow, a suit for the construction of the will was decided to the effect that the adoption was a condition precedent to the minor's taking the legacy. A review of that judgment was refused when after coming of age in 1894, he applied for it. His application to be allowed to appeal from that judgment was, however, granted, the circumstances being deemed by the appellate Court to be sufficient cause for the delay, within section 5 of the Limitation Act (XV of 1877).

The appellate Court subsequently heard the appeal and affirmed the decision of the Division Court. On appeal to the Privy Council.

Held, affirming the decree of the High Court, that the adoption was a condition precedent, and that the boy not having been adopted could not take under the will.

KARAMSI MADHOWJI *v.* KARSANDAS NATHA ... ...

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HOUSE-TAX—*House and land taxes—Valuation rules by Municipality—Magistrate's power to order the valuation—Bombay District Municipal Act (Bom. Act VI of 1873), Secs. 84, 85—Jurisdiction of Bombay Act, Act IV of 1874—Municipality.*

See MUNICIPALITY 146

HUSBAND AND WIFE—*Indian Divorce Act (IV of 1869), Secs. 17 and 20—Decree for nullity of marriage—Confirmation by the High Court—Time of confirmation—Practice—Procedure—Divorce.* Under the Indian Divorce Act (IV of 1869) a decree for nullity of marriage made by a District Court cannot be confirmed by the High Court before the expiration of six months from the pronouncing thereof.

A. *v.* B. 460

———*Maintenance order obtained by a wife against husband—Subsequent decree for restitution of conjugal rights obtained by husband—Effect of such decree on previous order of maintenance—Criminal Procedure Code (Act X of 1882), Sec. 488—Maintenance.*

See MAINTENANCE 484

———*Suit by husband for restitution of conjugal rights—Defence to such suit—Agreement for separation a good defence—Parsi Marriage and Divorce Act (XV of 1865). Sec. 36—Parsis—Marriage.*] Under section 36 of the Parsi Marriage and Divorce Act (XV of 1865) a contract by which a husband has agreed to allow his wife to live separate is a good defence to a subsequent suit by him for restitution of conjugal rights.

KAWASJI *v.* SIRINBAI 279

———*Suit for possession of wife—Wife herself defendant—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 35—Restitution of conjugal rights—Demand and refusal—Continuing cause of action—Limitation Act (XV of 1877), Sec. 23.*] Where a husband sued to recover possession of his wife, making the wife herself the defendant to the suit.

Held, it was in substance a suit for the restitution of conjugal rights, and Article 35 of the Limitation Act (XV of 1877) applied.

The demand and refusal, which form the starting point for limitation under Article 35, are a demand by the husband and refusal by the wife (or *vice versâ*) being of full age.

A positive refusal on the part of the wife to return to her husband is not essential to the husband's cause of action.

Quære—Whether in case of a refusal by a wife of full age to a demand made by her husband, that she should return to him, a suit by him for her recovery is barred under Article 35 of Schedule II of the Limitation Act (XV of 1877), or falls within the purview of section 23 as based on a continuing cause of action.

FAKIRGAUDA *v.* GANGI 307

IMMOVEABLE PROPERTY—*Order—to restore possession of—Criminal Procedure Code (Act X of 1882) Secs. 522, 523, 524.*

See CRIMINAL PROCEDURE CODE, 1882 404

INHERITANCE—*Daughters—Succession among daughters—The poorest daughter entitled to inherit the whole estate—Comparative poverty—Hindu law.*] In the Presidency of Bombay, the principle of law which governs the succession of daughters *inter se* as heirs to their father's estate is, that though the Courts ought not to go minutely into the question of comparative poverty, yet where the difference in wealth is marked, the whole property passes to the poorest daughter.

LOTAWA *v.* BASAWA 229

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INJUNCTION—*Contract in Zanzibar—Contract for personal service—Contract not to practise as physician—Construction—Restraint of trade—Contract Act (IX of 1872), Sec. 27.*] A agreed on certain terms to become assistant for three years to B, who was a physician and surgeon practising at Zanzibar. The letter (Exhibit B), which stated the terms which B offered and which (as the Court found) A accepted, contained the words "the ordinary clause against practising must be drawn up." At the end of a year a disagreement took place and A ceased to act as B's assistant and began to practise in Zanzibar on his own account. B sued for an injunction to restrain him.

Held, that B was entitled to an injunction restraining A from practising in Zanzibar on his own account during the period of three years.

CHARLESWORTH *v.* MACDONALD 103

———————*Light and air—Easement—Damages—Practice where amount of injury does not justify injunction.*] The plaintiff sued for an injunction restraining the defendant from erecting a building which interfered with the light and air coming to the plaintiff's house. The lower appeal Court found that, though the light and air of the plaintiff's house was sensibly diminished by the defendant's building, there was not such substantial damage done as would justify an injunction, and it dismissed the suit with costs, being of opinion that the plaintiff's remedy, if any, was a suit for damages.

Held, that the lower Court was right in not granting an injunction, but instead of dismissing the suit, and referring the plaintiff to another suit for damages, ought itself to have directed an inquiry as to the damages sustained by the plaintiff by reason of the diminution of the supply of light and air to his house.

KALLIANDAS *v.* TULSIDAS 786

INSOLVENCY—*Order of personal discharge—Finality of order—Indian Insolvent Act (Stat. 11 and 12 Vict., Cap. 21), Secs. 47, 56—Practice—Procedure.*] An order under section 47 of the Indian Insolvent Act (Stat. 11 and 12 Vict., Cap. 21) for the final discharge of an insolvent once granted cannot be set aside except upon the grounds specified in section 56 of that Act. The only course open to an opposing creditor is to apppeal against the order under section 73.

IN RE DAYABHAI SARUPCHAND 474

INSURANCE—*Covering note—Slip—Policy—Concealment of material fact.*] On the 15th March 1897, the plaintiff, who was a shipper of salt, applied for and obtained from the defendants' company in Bombay a preliminary "covering note" for Rs. 51,000 for salt to be shipped by him from Bombay to Calcutta. The note stated that a stamped policy in completion thereof would be issued on receipt of particulars. The plaintiff's practice was to bring salt from his salt-works at Uran in native prows and to put it on board steamers in Bombay harbour. On the 14th April 1897, the plaintiff put 591 bags of salt on board a prow for shipment in the British India steamer "Nairung." The transhipment commenced on the 27th April. Forty-nine bags had been transhipped when a storm arose and the prow shipped water and sank with the remaining 515 bags on board, which were thus wholly lost. Their value was Rs. 4,360. On the 29th April 1897, the plaintiff applied to the defendants' company for a policy and paid the premium, and on the 30th April, a policy of insurance was issued to him. It was "an issurance (lost or not lost) at and from Bombay to Calcutta upon any kind of goods and merchandise and freight of or on the ship or vessel called the 'Nairung,' including all risk of craft and boat to or from the ship or vessel." Upon this policy the plaintiff sued to recover the value of the lost salt, *viz.*, Rs. 4,360. The defendants pleaded that the covering note of 15th March 1897 did not constitute a completed agreement for the insurance of the salt; and as to the policy they pleaded that it was void, inasmuch as the loss had already occurred at the time of issue and that the plaintiff had concealed the fact

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from them. The plaintiff alleged that information of the loss was given on the 27th April when the policy was applied for, and he further contended that in any event, the defendants were liable, inasmuch as the covering note of 15th March 1897, was a complete and final contract binding upon the defendants, whatever events might subsequently have happened.

Held, affirming Candy, J., that the plaintiff was not entitled to recover.

KASAM HAJI MITHA *v.* FOREIGN MARINE INSURANCE COMPANY ... 737

INSURANCE *Life insurance effected by one person on the life of another in whose life he has no interest—Wagers Contract Act (IX of 1872), Sec. 30—Stat. 14 Geo. III, c. 48—Stat. 8 and 9 Vict., c. 106—Assignment of life policy to a stranger without interest in the life insured.*] The defendant company issued a policy for a term of ten years for Rs. 25,000 on the 23rd August 1894 on the life of Mehbub Bi, the wife of one Abdul Samad, who was a clerk in the employment of one Nasarwanji F. Bhandara, a barrister practising at Hyderabad. On the 1st September 1894, Mehbub Bi assigned the policy to the plaintiff Alamai, who was the wife of Nasarwanji F. Bhandara. On the 2nd October 1894, Mehbub Bi died. The plaintiff as assignee of the policy brought this suit to recover Rs. 25,000 from the defendants. The defendants (*inter alia*) contended that the policy had really been effected, not by Mehbub Bi or for her use or benefit or on her account, but by the said Nasarwanji F. Bhandara for his own use and benefit, and that he had no interest in the life of Mehbub Bi, and that, therefore, the policy was void.

Held (1) on the evidence that the policy had not been effected by Mehbub Bi, or for her use and benefit, but had been effected by Nasarwanji F. Bhandara for his own use and benefit, and that he had no interest in the life of Mehbub Bi.

(2) That in India an insurance for a term of years on the life of a person in which the insurer has no interest, is void as a wagering contract under section 30 of the Contract Act (IX of 1872), and that, therefore, the policy sued on was void.

Quære—Whether an assignment of a life policy to a stranger having no interest in the life of the insured is void?

ALAMAI *v.* POSITIVE GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LIMITED ... 191

IRRIGATION ACT (*Bom. Act VII of 1879*). *Sec. 18—Leakage water—Rights of riparian proprietors—Water course.*] The Irrigation Department has no power under Bombay Act VII of 1879, to dam a stream or a water-course on the ground that it derives its supply of water by leakage from an irrigation canal. Section 18 of the Act only gives the Department the special right of charging a water-rate on land which derives benefit from the leakage.

Water which has leaked from a canal into the land of another person does not belong to the Irrigation Department, so as to give the latter the right to follow it up and claim it as their own.

If the leakage flow was such that it itself had become, in the eye of the law, a canal or water-course, then the rights of the persons through whose lands it flowed would be governed by the law applicable to canals or water-courses.

BALVANTRAO *v.* SPROTT ... 761

JAINS—*Gujarati Jains settled in Belgaum—Succession among Jains—Rights of illegitimate sons of a Jain—Division into four castes—Inheritance—Illegitimate sons—Ordinary Hindu law, that of Brâhmins, Kshatriyas and Vaishyas—Jains mostly Vaishyas—Four divisions of Jains—Dasse Porvad caste of Jains—Hindu law.*

See HINDU LAW ... 257

JOINT FAMILY—*Family property—Family firm—Partnership—Partnership suit between members of joint family—Suit by a co-parcener for an account of the profits of a joint family firm—Injunction—Exclusion of partner—Hindu Law.*

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A member of a joint Hindu family cannot maintain a suit for an account of the profits of a partnership which is alleged to be joint family property, and an award of his share in such profits when ascertained.

This rule of Hindu law does not prevent an injunction being granted in cases in which one member of the family is prevented from taking part in the business of the firm.

GANPAT v. ANNAJI 111

JOINT FAMILY—*Manager—Debt contracted by a manager for family purposes—Decree against the managing member alone—Sale in execution of such decree—Effect of such sale—Hindu law.*]

See HINDU LAW 372

———————*Surety—Father's liability as surety—Liability of his son for the debt for which he was surety—Hindu law.*

See HINDU LAW 451

JURISDICTION—*Civil Procedure Code (Act XIV of 1882), Sec. 16, proviso, and Sec. 57—Relief to be obtained by personal obedience of defendants—Property situate outside the jurisdiction of the Court in which the suit is filed—Practice—Procedure.*] The proviso to section 16 of the Civil Procedure Code (Act XIV of 1882) requires not only that the relief sought should be entirely obtainable through the personal obedience of the defendant, but also that the defendant should reside within the jurisdiction of the Court in which the suit is filed.

Held, therefore, that a suit for the determination of an interest in immoveable property, filed in a Court within the jurisdiction of which the property was not situate, did not lie in that Court, as all the defendants did not reside within the jurisdiction of that Court, even though the relief sought could have been obtained through their personal obedience.

Held, also, that in such a case, the Judge ought not to dismiss the suit, but return the plaint to be presented to the proper Court under section 57 of the Civil Procedure Code.

ISAK v. KHATIJA 753

———————*Dekkhan Agriculturists' Relief Act (XVII of 1879), Secs. 3 (c), 53 and 73—Agriculturist—Plaintiff proved or admitted to be an agriculturist—Appeal—Special Judge.*

See DEKKHAN AGRICULTURISTS' RELIEF ACT 321

———————*Immoveable property—Civil Procedure Code (Act XIV of 1882), Sec. 16—Varshásans charged on villages in Nizám's territory and paid in the same territory—Suit to establish title to a share in such Varshásans—Plea of jurisdiction.*] An objection to jurisdiction may be raised at any stage of a suit, even after remand by the High Court in second appeal.

Plaintiffs filed a suit in the Court of the First Class Subordinate Judge at Násik to establish their right to a certain share in two *Varshásans* (annual allowances). The allowances were charged on the revenues of two villages in the Nizám's territory, and paid to the defendants by the Treasury Officer at Aurangabad in the same territory. The plaintiffs alleged that the *Varshásans* were granted to a common ancestor of the parties and enjoyed as joint ancestral property, while the defendants contended that the allowances were granted to their grandfather as his exclusive property to descend to his heirs, and that plaintiffs had no right to share in them.

Held, that the Násik Court had no jurisdiction to try the suit. The *Varshásans* were immoveable property, and there being a *bonâ fide* claim of title to them, the claim should be determined according to the law in force in the Nizám's dominions. The suit should, therefore, be brought in the Courts of the Nizám, in whose territory the *Varshásans* were granted and paid.

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Pleader's fee—Suit for a refund of the allowance paid to Pleaders appointed to be respondents' Pleaders

See Appeal 22

CRIMINAL PROCEDURE CODE—*Excommunication—Boycotting—Threats—Criminal intimidation—Bombay Criminal Procedure Code (Act V of 1898), Sections 107, 110, 112, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156,

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Naro having died, plaintiff brought this suit against Naro's son in 1895 to eject them from the khásgi thikáns.

Held, that the plaintiff was entitled to recover. The sale of the khoti takshim passed with it the khásgi lands allotted to the takshim. Both as mortgagee and purchaser of the takshim plaintiff acquired a title to the khásgi thikáns in dispute.

Held, also, that the effect of the decree which plaintiff had obtained against Naro in 1893 in the rent suit was that, in the absence of any agreement, Naro was a mere tenant-at-will of the khásgi thikáns, liable to be evicted after due notice.

Held, also, that a khoti sharer has not, with reference to a khoti khásgi thikán allotted to his share, an "occupancy right" against the body of khoti sharers, so that when he parts with his share in the khoti his khoti khásgi lands are changed into khoti nisbat lands.

RAGHUNATHRAO *v.* VASUDEV 769

KHOTI—*Trees—Right to cut trees—Khoti khásgi land in the Ratnágiri District—Dunlop's proclamation—Construction—Crown grant—Right to resist.*

See TREES 518

LANDLORD AND TENANT—*Agreement to occupy for a term—Permissive occupation—Expiration of term—Suit for possession—Limitation Act (XV of 1877), Arts.* 113, 139 *and* 144.] Plaintiffs sued to recover possession of a certain house from the defendants, resting their claim on a certain document, dated the 3rd May, 1880, executed by the defendants' father Mallappa to the plaintiffs' father Krishnappa. In this document Mallappa admitted that the house belonged to Krishnappa and promised to vacate it at the end of two years from the date of execution. The document being presented for registration on the 18th May, 1880, Mallapa denied its execution, but after inquiry the District Registrar ordered it to be registered. The lower Court dismissed the suit as barred by limitation (either by article 113 or article 144 of the Limitation Act, XV of 1877).

Held, reversing the decree and remanding the case, that the suit was not barred. By the agreement the tenancy or permissive occupation was to end on 3rd May, 1882. Either under article 139 or 111 the plaintiff had twelve years from that date within which to sue.

SHIVRUDRAPPA *v.* BALAPPA 283

———*Lease—Covenant for quiet enjoyment—Covenant implied—Interruption of tenant's enjoyment by order of plague officials—Suit for rent.*] A lessor sued to recover from his lessee rent for fifteen months from 1st August, 1897, to 31st October, 1898; under an agreement for lease for ten years dated 1st September, 1890, *i.e.*, prior to the application of the Transfer of Property Act (IV of 1882), to Bombay. The defendant contended that in the agreement there was an implied covenant for quiet enjoyment, and that as he had been compelled by the plague authorities to vacate the premises from 5th February, 1898, to 1st April, 1898, there had been a breach of the covenant. He claimed, therefore, to deduct the rent for that period or to be allowed it as a counter claim as damages for disturbance.

Held, (giving judgment for plaintiff), that even assuming that, in the agreement for the lease, a covenant for quiet enjoyment was to be implied, such a covenant could only be one for quiet enjoyment by the defendant so long as it was lawful for him to enjoy the property. No guarantee against the acts of Legislature could be read into the implied covenant for quiet enjoyment.

MERWANJI MANCHERJI CAMA *v.* SYED SIRDAR ALI KHAN 510

———*Lease for a year—Whole rent paid in advance—Destruction of premises before expiration of lease—Right of tenant to a refund of rent paid in advance—Apportionment—Transfer of Property Act (IV of 1882), Sec.* 108, *Cl.* (*e*)—*Contract Act (IX of* 1872), *Sec.* 65.] In April, 1896, the defendant let to the plaintiffs one compartment in a certain godown for storing goods for twelve months for a sum of Rs. 1,459 and a second compartment in

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the same godown for twelve months for Rs. 1,368. The plaintiffs entered into possession. In August, 1896, in accordance with the practice, the plaintiffs paid the said two sums in advance to the defendant and got a receipt. On the 30th October, 1896, without any default of the plaintiffs, the whole godown including the said two compartments was destroyed by fire and rendered wholly unfit for the purpose of storing goods. The plaintiffs thereupon sued for a refund of a proportionate part of the money paid to the defendant, relying upon section 108, clause (*c*), of the Transfer of Property Act (IV of 1882) and section 65 of the Contract Act (IX of 1872).

Held, that they were entitled to recover. The consideration was for the whole year. The lease, *i.e.*, the whole contract, had become void and, therefore, under section 65 of the Contract Act (IX of 1872) the defendant, who had received the whole consideration, was bound to make compensation for that portion which had failed.

DHURAMSEY *v.* AHMEDBHAI... 15

LAND REVENUE CODE, BOMBAY (BOM. ACT V OF 1879), SECS. 37, 38, 61—*Scope of Section* 37—*Survey—Omission to number lands at a survey—Effect of such omission on owner's rights—Summary settlement—Exclusion of land from summary settlement—Effect of such exclusion—Bombay Act VII of* 1863—*Sanad under the Act—Sanad.*] The plaintiffs, who were the inámdárs of certain land, sued for a declaration of their ownership in and of their right to cultivate (*a*) two plots of land which (they alleged) formed part of their inám, and (*b*) the bed of a stream which flowed through their land. It was contended for the defendants as to these two plots of land that the plaintiffs had no right to cultivate them, as they had been made a part of a village site, and on that understanding they had not been numbered at the survey in 1863 and had been exempted from assessment for twenty years. As to the bed of the stream, it was contended that the stream was a public stream, and that the bed of the stream as it dried up belonged to Government and not to the plaintiffs.

It was held by the lower appellate Court that section 61 of the Bombay Land Revenue Code (Bombay Act V of 1879) applied; that Government were competent to set apart a portion of the lands comprised in the sanad of the plaintiffs for a village site, and that as these lands had not been numbered at the survey of 1863 and had been exempt from assessment for more than twenty years, the plaintiffs had lost their right to cultivate them. On appeal to the High Court,

Held (reversing the decree of the lower Court), that the plaintiffs were entitled to the declaration prayed for.

Held, also (1) that section 61 of the Bombay Land Revenue Code did not apply. That section relates back to section 38 and both refer only to lands the property of Government in unalienated villages or unalienated portions of villages. They do not empower the Government to confiscate any land belonging to an inámdár and to confer it on the persons living in his village.

(2) That the mere omission to number the plots of land could not have the effect of turning them into a part of the village site, or take away the right of the plaintiffs. Nor did the omission of Government to assess these lands deprive the plaintiffs of them, or make them the property of Government.

(3) That the bed of the stream was the property of the plaintiffs, who owned the land upon its banks.

VENATAKRAO *v.* THE SECRETARY OF STATE FOR INDIA 39

LEASE—*Covenant for quiet enjoyment—Covenant implied—Interruption of tenant's enjoyment by order of plague officials—Suit for rent—Landlord and tenant.*

See LANDLORD AND TENANT 510

——*Lease for a year—Whole rent paid in advance—Destruction of premises before expiration of lease—Right of tenant to a refund of rent paid in advance—*

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Apportionment—Transfer of Property Act (IV of 1882), Sec. 108, Cl. e—Contract Act (IX of 1872) Sec. 65—Landlord and tenant.

See LANDLORD AND TENANT 15

LICENSE—*Easement—Indian Easement Act (V of 1882), Secs. 4 and 52—Right of growing rice plants in another's land to be afterwards transplanted to his own.*] A 'license' as defined by section 52 of the Indian Easement Act (V of 1882) is not, as in the case of an 'easement,' connected with the ownership of any land, but creates only a personal right or obligation. License rights are not generally transferable, and the transferee is not bound to continue the license granted by the former owner, while easements once established follow the property.

The plaintiff claimed and proved a prescriptive right of using a certain land belonging to the defendant's mortgagor for a certain part of the year for raising rice plants to be afterwards transplanted to his own land.

Held, that the right was clearly enjoyed by the plaintiff as owner of some land to which the young rice plants were transplanted, and that such a right, so attached to plaintiff's land, was not a license but an easement of the nature of *profits a prendre*.

SUNDRABAI *v.* JAYAWANT 397

LIGHT AND AIR—*Easement—Damages—Practice where amount of injury does not justify injunction—Injunction.*

See INJUNCTION 786

LIMITATION—*Acknowledgment—Limitation Act (XV of 1877), Sec. 19—Extraordinary jurisdiction of High Court—Civil Procedure Code (Act XIV of 1882), Sec. 622—Evidence—Question of admissibility of document—Document "without prejudice"—Evidence Act (I of 1872), Sec. 23.*] In a suit for Rs. 465 the defendant pleaded limitation. In reply the plaintiff relied on an acknowledgment of the debt given by the defendant. The alleged acknowledgment was written on a post card sent by the defendant to the plaintiff. It was in Gujarâti and was as follows:—"I was bound to send Rs. 30 according to my *vaida* (fixed time), but on account of the receipt of the intelligence of the death of my father I have not been able to fulfil my promise. But now, on his obsequies being over, I will positively pay Rs. 30 at Shet Merwanji's. You, Sir, should not entertain any anxiety whatever in respect thereof. As to whatever debts may be due by my old man, I am bound to pay the same so long as there is life in me. This is, indeed, my earnest wish. After this, God's will be done. Therefore I will positively pay Rs. 30." The post card bore on it also the words "without prejudice" in English. The lower Courts held that it was, therefore, inadmissible in evidence and, consequently, that the plaintiff's claim was barred, and they dismissed the suit. The plaintiff thereupon applied to the High Court in its extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XV of 1882) and obtained a rule *nisi* to set aside the decree of the lower Courts on the ground that the post card had been improperly excluded from evidence.

Held, discharging the rule, that even if the post card were admissible in evidence, it did not amount to an acknowledgment of the debt claimed by the plaintiff, which was, therefore, barred by limitation.

Per FARRAN, C. J.:—I am myself strongly inclined to the view that when Courts in the exercise of their judicial functions decide that a document is inadmissible in evidence, having exercised their judgment upon the question of its admissibility or inadmissibility, we have no jurisdiction to interfere in the matter under section 622. What the Courts do in such a case, assuming the document tendered to be erroneously rejected, is to make a mistake upon a question of law, and it does not appear to me to be material whether the mistake in law is made during the hearing of the case or in the final decision. A mere error in law, is not, I think, an illegality or a material irregularity within the meaning of section 622 of the Code.

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Per CANDY, J.:—I doubt whether the post card was inadmissible in evidence. To exclude it from evidence, it would be necessary to hold that the words "without prejudice" amounted to an express condition that the card should not be used in evidence agsinst the writer. In England apparently the card would have been admissible—*In re Daintrey* ((1893) 2 Q. B., 116)

MADHAVRAV *v.* GULALBHAI 177

LIMITATION—*Appeal—Limitation Act* (*XV of* 1877), *Sec.* 12, *Sch. II, Art.* 152—*Civil Procedure Code* (*Act XIV of* 1882), *Sec.* 205—*Date of judgment—Date of decree—Bill of costs signed subsequently—Time requisite for obtaining copy of the decree—Time between pronouncement of judgment and signing of the decree—Practice.*] The time for presenting an appeal agsinst a decree or order is thirty days from the date of such decree or order (article 152 of the Limitation Act, XV of 1877). The date of the decree or order is the date on which judgment is pronounced.

The time excluded from the period of limitation by section 12 of the Limitation Act must be taken to commence only when the party appealing does something in order to obtain the copy of the judgment or decree, and to end when he obtains the copy. A party who delays to apply for such copy is not entitled to exclude the period of such delay.

A party is at liberty to apply for a copy of the decree, whether the decree has been signed or not. If he has applied, but the copy cannot be prepared because the decree has not been signed, then this time and the time taken up in preparing the copy will be excluded, but so long as he has made no application, the non-signature of the decree can have no effect at all upon him.

Judgment was pronounced on the 18th December 1897, rejecting an application made by a plaintiff in execution of a decree) but the bill of costs (the order as to costs being a part of the order or decree) was not signed until 18th January, 1898. The plaintiff proposing to appeal against the above order applied for copies of the judgment and order on the 14th January. The copies were furnished to him on the 24th January, 1898. The appeal was presented on the 24th February. The lower Court held the appeal barred by limitation under article 152 of the Limitation Act, not having been presented within thirty days from the date of judgment. On appeal to the High Court,

Held, that the appeal was barred. The only time allowed by law to be excluded was from the 14th January, 1898, on which date copies of the judgment and order were applied for, to the 24th January, 1898, on which date they were furnished. The judgment was pronounced on the 18th December, 1897. The non-signing of the decree was no cause for or explanation of the delay between that date and the 14th January, 1898, or for the delay between the 24th January, 1898, and the 24th February, 1898.

YAMAJI *v* ANTAJI 442

———*Limitation Act* (*XV of* 1877), *Secs.* 10 *and* 28, *Arts.* 120, 141 *and* 144—*Will—Hindu law—Dharam—Bequest for dharam.*] The testator died in 1869 leaving two widows to whom he made specific bequests "for enjoying" "the rent and for making *dharam dan*." He bequeathed the residue of his property, moveable and immoveable, to trustees for *dharam*. One of the widows died in 1871, and the other in 1888. On the death of the survivor this suit was brought in 1888 to have the bequest set aside and for administration of the estate.

Held, on the question of limitation, that the suit was not barred. The limitation, if applicable to the moveables, would have been under article 120, and to the immoveables under article 141 of Act XV of 1877. Article 144, which makes the period of limitation commence from the date when the possession of the defendant becomes adverse to the plaintiff, does not apply where the suit is otherwise specially provided for, and, therefore, had no application here. At the same time, section 28 of the Act as to the extinction of a right by the effect of limitation running against

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the widows, if it had done so, would not have been applicable to the plaintiff, whose right was not derived from or through the widows, but was derived through their husband on the death of the surviving widow.

RUNCHORDAS *v.* PARVATIBAI 725

LIMITATION—*Limitation Act (XV of 1877), Sch. II—Decree—Execution by Collector—Application to Collector to set aside sale—Civil Procedure Code (Act XIV of 1882), Secs. 244, 310A, 311 and 320.*] A decree passed against the applicant Narayan was transferred for execution to the Collector under section 320 of the Civil Procedure Code (Act XIV of 1882). On the 8th May, 1897, the Collector in execution sold certain property belonging to the applicant, which was purchased by the respondents. On the 17th May, 1897, the applicant applied to the Collector to set aside the sale on the ground of alleged irregularities, and the Collector having referred the matter to the Mámlatdár for report, forwarded the record to the Court on 30th July, 1897. On the 6th August, 1897, the applicant, fearing that he had not applied to the proper Court, applied to the Subordinate Judge to set aside the sale, framing his application both under section 310A and section 311 of the Civil Procedure Code (Act XIV of 1882). He contended that, under section 11 of the Limitation Act (XV of 1877) his application was not barred.

Held, that the application was barred by limitation. Under the rules made by the Government of Bombay under section 320 of the Civil Procedure Code (Act XIV of 1882), the Collector had no jurisdiction. There was, therefore, no *bond fide* mistake of jurisdiction such as would justify the Court in excluding the time occupied in applying to the Collector from the period of limitation.

Under the rules made by the Local Government of the Bombay Presidency, a Collector has not the power of the Court, under section 311 of the Civil Procedure Code (Act XIV of 1882), to set aside a sale.

No second appeal lies from an order made under section 311 of the Civil Procedure Code (Act XIV of 1882).

NARÁYAN *v.* RASULKHAN 531

———*Limitation Act (XV of 1877), Sch. II, Art. 35—Restitution of conjugal rights—Demand and refusal—Continuing cause of action—Limitation Act (XV of 1877), Sec. 23—Husband and wife—Suit for possession of wife—Wife herself defendant.*] Where a husband sued to recover possession of his wife, making the wife herself the defendant to the suit,

Held, it was in substance a suit for the restitution of conjugal rights, and article 35 of the Limitation Act (XV of 1877) applied.

The demand and refusal, which form the starting point for limitation under article 35, are a demand by the husband and refusal by the wife (or *vice versâ*) being of full age.

A positive refusal on the part of the wife to return to her husband is not essential to the husband's cause of action.

Quære—Whether in case of a refusal by a wife of full age to a demand made by her husband, that she should return to him, a suit by him for her recovery is barred under article 35 of Schedule II of the Limitation Act (XV of 1877), or falls within the purview of section 23 as based on a continuing cause of action.

FAKIRGAUDA *v.* GANGI 807

———*Limitation Act (XV of 1877), Sch. II, Art. 47—Vendor and purchaser—Contract of sale—Non-payment of purchase money—Suit for possession by vendee who has not paid the purchase money—Remedy of vendor.*

See VENDOR AND PURCHASER 525

———*Limitation Act (XV of 1877), Sch. II, Arts. 113, 139 and 144—Landlord and tenant—Agreement to occupy for a term—Permissive occupation—*

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Expiration of term—Suit for possession.] Plaintiff sued to recover possession of a certain house from the defendants, resting their claim on a certain document, dated the 3rd May, 1883, executed by the defendants' father Mallappa to the plaintiffs' father Krishnappa. In this document Mallappa admitted that the house belonged to Krishnappa and promised to vacate it at the end of two years from the date of execution. The document being presented for registration on the 18th May 1880, Mallappa denied its execution, but after inquiry the District Registrar ordered it to be registered. The lower Court dismissed the suit as barred by limitation (either by article 113 or article 111 of the Limitation Act XV of 1877).

Held, reversing the decree and remanding the case, that the suit was not barred. By the agreement the tenancy or permissive occupation was to end on 3rd May, 1882. Either under article 130 or 144 the plaintiff had twelve years from that date within which to sue.

SHIVRUDRAPPA *v.* BALAPPA 283

LIMITATION—*Limitation Act* (*XV of* 1877), *Sch. II, Art.* 134—*Mortgage—Purchaser from mortgagee—Necessity of possession in order to validate transaction as against original mortgagor.*] A person purchasing or taking a mortgage from a mortgagee believing that he is getting a good title must have possession of the property for the statutory period in order to validate the transaction as against the original mortgagor under article 134 of the Limitation Act (XV of 1877).

RAMCHANDRA *v.* SHEIKH MOHIDIN 614

———*Limitation Act* (*XV of* 1877), *Sch. II, Art.* 138—*Article applicable to suits by assignees of auction-purchaser—Assignee of auction-purchaser.*] Article 138 of the Limitation Act (XV of 1877) is not limited to suits by the auction-purchaser himself, but applies also to suits by his assignees.

Limitation runs from the date of the sale.

Mohima Chunder v. *Nobin Chunder* ((1895) 23 Cal., 49) dissented from.

GOVIND *v.* GANGAJI 246

———*Limitation Act* (*XV of* 1877), *Sch. II, Art.* 179—*Mortgage—Redemption—Decree for redemption—No time fixed in the decree for payment—Execution—Limitation.*] On the 27th June, 1885, a consent-decree was passed in a redemption suit to the following effect:—

"Plaintiffs should pay the sum of Rs. 733 to the defendants within a month of this date; in case they do not pay the money, then in the year in the month of Chaitra in which they pay the money, the defendants should give back to them possession of the land; till that time the defendants should pay the Government assessment and enjoy the produce in lieu of interest."

On the 27th June, 1897, plaintiffs applied for execution of the decree, praying for possession alone on the ground that the redemption money had been paid off by their payments of assessment, &c., on behalf of the defendants.

Held, that the application for execution was time-barred under article 179 of the Limitation Act (XV of 1877). The words of the decree were vague and indefinite, and were to be considered as really mentioning no time for payment. The decree was, therefore, to be taken as operating from its date, and to be enforceable only within three years from that time, unless kept alive by application for execution made according to law within the prescribed periods.

MARUTI *v.* KRISHNA 592

———*Mortgage—Suit for sale of mortgaged property—Regulation V of 1827, Sec.* 15, *Cl.* 3—*Special agreement.*

See MORTGAGE 781

LIMITATION ACT (XV OF 1877), SEC. 5—*Appeal not presented in time—Sufficient cause for delay—Discretion of Judge—Second appeal—Civil Procedure Code (Act XIV of* 1882), *Sec.* 584—*Exercise of discretion not to be interfered with.*] Where an appeal has been dismissed as barred by limitation, the

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lower Court holding that there was no sufficient cause for not presenting it within the prescribed time, the High Court can only interfere in second appeal if that decision is contrary to law, that is, if the lower Court has exercised its discretion capriciously or arbitrarily or without proper legal materia. to support its decision.
PARVATI v. GANPATI 513

LIMITATION ACT (XV OF 1877), SEC. 5—*Civil Procedure Code (Act XIV of 882,) Sec. 561—Practice—Appeal by defendants—Objections to decree filed by plaintiff—Subsequent withdrawal of appeal—Application by plaintiff for leave to appeal—Sufficient cause.*
See APPEAL 692

——————SECS. 7 AND 17—*Partnership—Death of partner—Subsequent recovery of assets by surviving partner—Suit by administrator of deceased partner against surviving partner for recovered assets—Suit for partnership account.*
See PARTNERSHIP 544

——————SCH. II, ART. 179—*Dekkhan Agriculturists' Relief Act (XVII of 1879), Sec. 44—Agreement filed under section 15 becoming a decree—Default in payment of instalments due under decree—Application to make decree absolute under Section 89 of Transfer of Property Act (IV of 1882).*
See DEKKHAN AGRICULTURISTS' RELIEF ACT 614

——————SCH. II, ART. 179, EXPL. I—*Liability of surety in execution—Application for execution against a surety when a step in aid of execution against a principal—Mode of enforcing payment against a surety—Practice—Procedure—Surety.*] Vináyak Rámchandra was awarded the sum of Rs. 4,951-13-11 by the District Judge as compensation for land taken up by the Collector under the Land Acquisition Act, 1870. The money was ordered to be paid over to him on his giving security for its refund in case the appellate Court so ordered. Damodar Viziarangam thereupon became his surety and executed a bond binding himself to pay into Court the said sum of Rs. 4,951-13-11, if ordered by the Court. On the 25th September, 1893, the High Court varied the order of the District Court and awarded Rs. 4,204-7-11 (part of the Rs. 4,951-13-11) to another claimant Kusáji Ramji (the appellant). On 17th February, 1894 Kusáji applied for execution of this order against the surety Damodar and claimed also interest (Rs. 1,635-10-0) and costs (Rs. 550-15-4). Damodar objected to pay interest or costs, and the High Court held that, as surety, he was liable only for the principal sum, but not to interest or costs. Subsequently, *viz.*, on the 16th February, 1897, Kusáji applied for execution against the principal debtor Vinayek of the order of the 25th September, 1893, in respect of the interest and costs, contending that his application of the 17th February, 1894, against the surety was a step in aid of the execution of the order under article 179 of the Limitation Act (XV of 1877) and prevented limitation.

Held, that his application was barred by limitation. The application for execution against the surety would not operate to keep alive the order as against the principal debtor unless it was made to enforce a liability which was common to both under the order. But under the order the surety was not liable for interest or costs. His liability was expressly confined by his bond to the principal sum, and it was only as to that sum that he was jointly liable with Vinayak. The previous application, therefore, for execution against the surety for money for which he was not liable under the order, could not be regarded as a step in aid of execution against the principal debtor Vinayak.

The mode of enforcing payment against a surety is by summary process in execution and not by separate suit.
KUSAJI v. VINAYAK 478

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LIMITATION ACT (XV OF 1877), ART. 179, CL. 4—*Step in aid of execution—Application for return of a copy of a decree.*] An application to the Court by a decree-holder asking for the return of the copy of a decree filed with a former darkhást is not a step in aid of execution within the meaning of article 179 (4) of the Limitation Act (XV of 1877).

RAJARAM *v.* BANAJI MAIRAL 311

——CL. 5—*"Date of issuing notice," meaning of the words—Execution of decree—Orders in execution proceedings—Res judicata—Withdrawal of application for execution—Effect of such withdrawal.*] Article 179, clause 5, of the Limitation Act (XV of 1877) applies only where the notice under section 248 of the Code of Civil Procedure (Act XIV of 1882) has been actually issued. If no notice is issued, time cannot be counted from the date of the order of the Court; though it may be that where a notice has been issued, the date of its issue would be the date on which the Court ordered its issue.

Orders in execution proceedings, if not appealed from, are binding on the parties to the suit in all subsequent proceedings in that suit, on principles analogous to those of *res judicata* strictly so called. It is, therefore, necessary to constitute a bar that there should be a hearing and final decision.

Where an application for execution is allowed to be withdrawn, the matters in dispute are not heard and decided. There is, therefore, no *res judicata*.

HARI GANESH *v.* YAMUNABAI 35

LUNATIC—*Guardian of the person of a lunatic not competent to sue in respect of the lunatic's estate—Civil Procedure Code (Act XIV of 1882), Sec. 440—Guardian—Right to sue—Practice—Procedure.*] A guardian of the person only of a lunatic has no right to bring a suit in respect of the lunatic's estate. The manager of the lunatic's estate is the only person who can institute such a suit.

The word "guardian" in section 440 of the Civil Procedure Code (Act XIV of 1882) as amended by Act VIII of 1890, when applied to a lunatic means the manager of his estate. Under this section a person other than the guardian of the estate can also sue with the leave of the Court.

BAI DIVALI *v.* HIRALAL 403

——*Suit by wife as next friend, alleging husband to be a lunatic—Husband not an adjudged lunatic—Civil Procedure Code (Act XIV of 1882), Sec. 462—Act XXXV of 1858—Practice—Procedure.*] Where a wife alleging her husband to be of unsound mind, brought a suit as next friend, the Court ordered an inquiry (1) as to whether the husband was of unsound mind and (2) as to whether the suit was for his benefit.

PRANSUKHRAM *v.* BAI LADKOR 653

MAHOMEDAN LAW—*Gift—Gift if not perfected by possession is invalid—Delivery of possession—Possession—Registration.*] Under the Mahomedan law a registered deed of gift is not valid if it is never perfected by possession.

The Mahomedan law requires that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession to the donee.

Registration is not equivalent to possession.

ISMAL *v.* RAMJI 682

——*Joint property—Partition—Suit for share of such property—Share allotted to defendant in same suit on payment of court-fees—Practice—Procedure.*] In the Presidency of Bombay a suit for partition of an inheritance by Mahomedans is hardly distinguishable from a partition suit by Hindus. In such a suit, if a defendant asks at the proper time to have his share divided off and allotted to him, such relief should be granted to him on payment of the necessary court-fees.

ABDUL KADAR *v.* BAPUBHAI 188

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MAINTENANCE—*Husband and wife—Maintenance order obtained by a wife against husband—Subsequent decree for restitution of conjugal rights obtained by husband—Effect of such decree on previous order of maintenance—Criminal Procedure Code (Act X of 1882), Sec. 489.*] A decree of a Civil Court for restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance, if the wife should persist in refusing to live with her husband. A Magistrate ought to cancel a previous order of maintenance made by him, or rather treat it as determined, if the wife failing to comply with the decree for restitution refuses to live with her husband.

In re Bulakidas 484

———*Maintenance of daughter-in-law—Claim of daughter-in-law against self-acquired property of her father-in-law in hands of his heirs—Hindu law.*] The widow of a predeceased son, who lived in union with his father, has a legal right to maintenance from her mother-in-law out of the self-acquired property of the father-in-law, to which his widow has succeeded as his heir. A son's widow has no legal claim for maintenance against self-acquired property in the hands of her father-in-law, but when such property devolves upon his heirs, the daughter-in-law has a claim against it in their hands for maintenance if her husband had lived in union with his father.

Yamunabai *v.* Manubai 608

———*Widowed daughters—Their right of maintenance out of their father's estate—Hindu law—Daughters.*] According to Hindu law, it is only the unmarried daughters who have a legal claim for maintenance out of their father's estate. The married daughters must seek their maintenance from the husband's family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs.

Bai Mangal *v.* Bai Rukhmini 291

———*Widow's maintenance—Right of maintenance charged on property left by testator—Sale of such property in fraud of widow's right of maintenance—Right of widow as against purchaser—Transfer of Property Act (IV of 1882), Sec. 39—Hindu law—Widow.*] A testator, by his will, gave his widow's maintenance out of the income of his immoveable estate, subject to a limited power of sale or mortgage conferred upon his executrix for a special purpose. It was found by the lower Courts that a large part of the property was sold by the executrix with the object of defeating the claim of the plaintiff, who was one of the testator's widows, and that the purchaser was aware of the fraud.

Held, that the plaintiff was entitled to recover her maintenance out of the property in the hands of the purchaser. The purchaser having been aware of the fraud, the plaintiff's right to maintenance against the property in his hands remained unaffected, whether under section 39 of the Transfer of Property Act (IV of 1882) or the law previously in force and irrespective of the possibility of her claim being satisfied from other property.

Shri Beharilalji *v.* Bai Rajbai 342

MA'MLATDA'R—*Jurisdiction—Mámlatdárs' Act (Bom. Act III of 1876), Sec. 4—Disputes between riparian proprietors.*] A Mámlatdár's Court has no jurisdiction to determine questions arising between riparian proprietors as to the amount of water each can take from a stream.

A suit will lie in a Mámlatdár's Court where a person has been dispossessed or deprived of the use, or when he has been disturbed or obstructed, or when attempt has been made to disturb or obstruct him in the use of water of which he is in possession or was in possession within six months before suit.

Babaji Ramji *v.* Babaji Devji 47

———Sec. 4—

Water—Water-course—Riparian owners, right of.] What would constitute an

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unreasonable diversion of water such as to disturb the use of the lower riparian owners, is a question of fact which the Legislature has given a Mámlatdar jurisdiction to decide.

NARAYAN v. KASHAV 506

MA'MLATDA'R—*Mámlatdár's Court—Jurisdiction of Mámlatdár over officers of Government sued in their official capacity—Act XIV of* 1869, *Sec.* 32—*Act X of* 1876, *Sec.* 15.—*Bombay Irrigation Act (Bom. VII of* 1879), *Sec.* 48—*Leakage water—Rights of riparian proprietors—Water-course.*

A Mámlatdár has jurisdiction, under Bombay Act III of 1876, to hear and determine a suit brought against officers of Government for acts purporting to have been done by them in their official capacity.

The Irrigation Department has no power, under Bombay Act VII of 1879, to dam a stream or a water-course on the ground that it derives its supply of water by leakage from an irrigation canal. Section 48 of the Act only gives the Department the special right of charging a water-rate on land which derives benefit from the leakage.

Water which has leaked from a canal into the land of another person does not belong to the Irrigation Department, so as to give the latter the right to follow it up and claim it as their own.

If the leakage flow was such that it itself had become, in the eye of the law, a canal or water-course, then the rights of the persons through whose lands it flowed would be governed by the law applicable to canals or water-courses.

A Mámlatdár has no power to inquire into matters not covered by the issues laid down by the Act itself.

BALVANTRAO v. SPROTT 761

MINOR—*Capacity to contract—Contract Act (IX of* 1872), *Secs.* 2, 10, 11, 247, 248—*Ratification—Release by minor father of his interest in joint property to his son—Family arrangement—Voluntary conveyance by father to son—Transaction impeached by subsequent creditors.*] *Per* FARRAN, C. J., and RANADE, J., (FULTON, J., dissenting).—In India the contract of a minor is not void but voidable only and is capable of ratification after he attains majority.

A release by a minor father of all his right and interest in the ancestral property to his son *held* to be valid if ratified by the donor after he attained majority.

Per RANADE, J.:—The property sought to be protected by the release was admittedly ancestral property, and Vaman's minor son had a half share in it, of which the minor could at any time claim partition. The release was only intended to protect Vaman's one-half share against the consequences of his own improvidence. When all existing debts were paid of and settled, Vaman's right to make a voluntary conveyance of the same in his minor son's interest cannot be questioned. Such conveyances are well known in English law, and there have been cases in India also where Courts have given effect to such voluntary conveyances or gifts by a father to his son—*Ganga Sahai* v. *Hira Singh* (1880) 2 All., 809). Such transactions do not become colourable merely because in their ultimate consequences they have the effect of protecting the family property against the prospective extravagance of the settlor, or because no adequate consideration is shown to have been paid by the party benefited.

Per FULTON, J.:—Apart from section 7 of the Transfer of Property Act, 1882, which was not in force in the Presidency of Bombay when the release of 1887 was executed, a conveyance depends on a preceding contract and cannot be valid unless the party making it is competent to contract. Without an antecedent agreement to give and receive, there can be no transfer at all. The power to convey must depend on the power to contract. Unless it can be held that the provisions of section 10 of the Contract Act were not meant to be exhaustive, and it was intended to leave out of consideration agreements by minors, we must hold that a minor is incompetent to contract.

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Vaman Sadashiv, a minor member of an undivided Hindu family, in 1887 executed a release of his right and interest in certain ancestral property to his minor son. In 1882 the plaintiff obtained a decree against him in respect of a debt incurred subsequently to the date of the release, and he sought to attach the released property in execution of his decree. He impeached the validity of the release.

Held (by FARRAN, C. J., and FULTON, J. (RANADE, J., dissenting) that the release was inoperative and that the plaintiff was entitled to attach the property in execution of his decree.

By FARRAN, C. J., on the ground that it had not been ratified by Vaman after he attained his majority.

By FULTON, J., on the ground that the release was absolutely void and incapable of ratification.

Per FARRAN, C. J., and RANADE, J., (FULTON, J., dissenting) :—The release was voidable only at the option of the minor (Vaman) and was not void, and if it was ratified or not repudiated by him on attaining majority it was, in the absence of fraud, a valid transaction, at least as against judgment-creditors whose debts were of a subsequent date.

SADASHIV *v.* TRIMBAK 146

MINOR—*Suit on behalf of minor—Decree—Compromise of decree by next friend—Application to set aside compromise—Modes of impeaching the decree—Practice—Procedure—Civil Procedure Code (Act XIV of* 1882), *Sec.* 462.] Where a decree to which a minor is a party has been compromised with leave of the Court granted under section 462 of the Civil Procedure Code (Act XIV of 1882), the compromise cannot be subsequently re-opened by the Court *proprio motu* on the ground that it gave the minor less property than he was entitled to under the decree. The modes in which such an order can be impeached are, at the most, two, namely, by review or by suit.

VIRUPAKSHAPPA *v.* SHIDAPPA... 620

MORTGAGE—*Guardian—Certificated guardian—Mortgage by such guardian without Court's permission—Validity of such mortgage—Sanction under Civil Procedure Code (Act XIV of* 1882), *Sec.* 305—*Guardians and Wards Act (VIII of* 1890), *Secs.* 29 *and* 30—*Act XX of* 1864.]

See GUARDIAN 287

———*Money decree obtained by mortgagee—Execution—Sale of mortgaged property in execution—Purchaser at such sale—Title of such purchaser—Transfer of Property Act (IV of* 1882), *Sec.* 99.] Previous to the passing of the Transfer of Property Act (IV of 1882), a mortgagee obtained a money-decree against his mortgagor and in execution sold the mortgaged property. The son of the mortgagee bought it at the sale.

Held, that by his purchase at the execution-sale the son took an absolute title and was not liable subsequently to be redeemed at the suit of the heirs of the mortgagor.

Martand v. *Dhondo* ((1897) 22 Bom., 624) distinguished.

Semble.—A third person purchasing mortgaged property *bonâ fide* at a sale in execution of a money decree obtained by the mortgagee against the mortgagor obtains a good title free from the mortgage lien, unless the sale is made subject to it.

HUSEIN *v.* SHANKARGIRI 119

———*Mortgage by co-sharer of undivided share—Partition suit subsequently brought by other co-sharer to which mortgagee not a party—Mortgaged property allotted to a sharer other than mortgagor—Rights of such co-sharer—Partition*

re-opened—Fraud of mortgagor and mortgagee—Partition—Co-sharers.
See PARTITION 385

MORTGAGE—*Power of sale—Suit to set aside sale under power of sale—Promise by mortgagee to postpone sale—Evidence of such promise admissible—Evidence Act (I of 1872), Sec. 92, Proviso 1—Contract Act (IX of 1872), Sec. 63—Transfer of Property Act (IV of 1882), Sec. 69—Town of Bombay, limits of.*] The plaintiff mortgaged certain property to the first defendant on 28th December, 1895. By the mortgage deed the mortgage debt was made repayable on 28th December, 1896. On the 12th May, 1897, the first defendant sold it by auction under the power of sale contained in the mortgage deed to the second defendant who was the purchaser. The plaintiff now sued to set aside the sale and be allowed to redeem, alleging that on the day before the sale the first defendant had orally promised and agreed to postpone the sale for four days and that the second defendant had notice of this fact before he purchased the property.

Held, that evidence of such oral agreement was admissible. It was not an agreement to modify any of the terms of the mortgage; it was merely an agreement to forbear, for a period of four days, from the exercise of the power of sale given by the mortgage. It, therefore, did not fall within proviso 1 of section 92 of the Evidence Act (I of 1872).

Held, also, that the said promise or agreement, if made by the mortgagee, was not an extension of time for the performance of the plaintiff's (mortgagor's) promise to him, which was to pay the mortgage-debt on the 28th December, 1896, but was an agreement to refrain from exercising, for a stated period, the right of sale arising from non-performance, and, therefore, section 63 of the Contract Act (IX of 1872) did not apply.

Land situate in the district of Mahim within the island of Bombay, and within the local limits of the original jurisdiction of the High Court, is situate within the town of Bombay, in the sense in which that expression is used in section 69 of the Transfer of Property Act (IV of 1882)

TRIMBAK GANGADHAR RANADE *v.* BHAGWANDAS 348

———*Purchase from mortgagee—Necessity of possession in order to validate transaction as against original mortgagor—Limitation Act (XV of 1877), Sch. II, Art. 134.*] A person purchasing or taking a mortgage from a mortgagee believing that he is getting a good title must have possession of the property for the statutory period in order to validate the transaction as against the original mortgagor under article 134 of the Limitation Act (XV of 1877)

RAMCHANDRA *v.* SHIKAR MOHIDIN 614

———*Redemption—Decree for redemption—No time fixed in the decree for payment—Limitation—Limitation Act (XV of 1877), Art. 179.*] On the 27th June, 1885, a consent-decree was passed in a redemption suit to the following effect:—

"Plaintiffs should pay the sum of Rs. 733 to the defendants within a month of this date; in case they do not pay the money, then in the year in the month of Chaitra in which they pay the money, the defendants should give back to them possession of the land; till that time the defendants should pay the Government assessment and enjoy the produce in lieu of interest."

On the 27th June, 1897, plaintiffs applied for execution of the decree, praying for possession alone on the ground that the redemption money had been paid off by their payments of assessment, &c., on behalf of the defendants.

Held, that the application for execution was time-barred under article 179 of the Limitation Act (XV of 1877). The words of the decree were vague and indefinite, and were to be considered as really mentioning no time for payment.

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The decree was, therefore, to be taken as operating from its date, and to be enforceable only within three years from that time, unless kept alive by application for execution made according to law within the prescribed periods.
MALLTI v. KRISHNA 502

MORTGAGE—*Suit for sale of mortgaged property—Regulation V of 1827, Sec. 15, Cl. 3—Special agreement—Limitation.*

Plaintiff brought this suit in 1897 on a mortgage-bond, dated 1870, to recover the balance due on the mortgage by sale of the mortgaged property, or, in the alternative, for possession of the property until payment of the balance. The mortgage contained a stipulation that, on default of payment of interest by the mortgagor, the mortgagee should take possession and hold possession in lieu of interest, and that such possession should continue until the mortgagor paid the principal and interest that remained unpaid when the mortgagee took possession.

The Judge dismissed the suit, holding that the claim for possession was time-barred, and the claim for the sale of the property could not be enforced, as the mortgage-bond contained a special agreement which took the case out of clause (3) of section 15 of Regulation V of 1827.

On appeal, *held*, reversing the decree, that section 15 of Regulation V of 1827 was not applicable, as the mortgagee never was in possession, and that the claim to enforce the mortgage security by sale was not barred.
SIDHESVAR v. BAPAJI 781

MUNICIPALITY—*Bombay District Municipal Act (Bom. Act VI of 1873), Sec. 48—Re-erection of a structure formerly existing not within the section.*] Section 48 of the Bombay District Municipal Act (Bom. Act VI of 1873) refers to the erection of a thing for the first time, and not to the re-erection of an old structure which had been taken down for a temporary purpose only.

The accused was the owner of a shop in a public street at Thána. The shop had planks attached to it in front, overhanging a public gutter. These planks had been in existence before the District Municipal Act came into operation at Thána. In April, 1897, the planks were temporarily removed under the orders of the plague authorities. The plague having ceased, the accused replaced the planks in October, 1897, without the permission of the municipality. For this he was prosecuted and fined under section 48 of Bombay Act VI of 1873.

Held, reversing the conviction and sentence, that the refixing of the planks was not an "erection" within the meaning of section 48 of the Act.
KALA GOVIND v. MUNICIPALITY OF THÁNA 248

———*Bombay Municipal Act (Bom. Act III of 1888), Sec. 249—"Employed"—Meaning of the word—Discretion vested in the Municipal Commissioner.*] The word "employed" in section 249 of the Bombay Municipal Act (Bombay Act III of 1888) refers to employment of any kind or for any length of time.
MUNICIPALITY OF BOMBAY v. AHMEDBHOY HABIBHOY 528

———*House-tax—House valuation—Valuation made by Municipality—Magistrate's power to revise the valuation—Bombay District Municipal Act (Bom. Act VI of 1873), Sec. 84 as amended by Bombay Act II of 1884.*] Under the rules passed under the Bombay District Municipal Act (Bom. Act VI of 1873) as amended by Bombay Act II of 1884 the Municipality of Wái estimated the annual letting value of a house belonging to the accused at Rs. 50 and levied a house-tax of Rs. 2-8. A, a tax-payer, applied to the managing committee for a reduction of the tax, but his application was dismissed. Default having been made in payment of the tax, A was prosecuted under section 84 of the Act before a Second Class Magistrate. He contended that the estimate made by the Municipality was too high, and that his house would not let for more than 10 or 12 Rs. a year. The

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Magistrate took evidence on the point and found that the annual rental of the house would not exceed Rs. 12, and he ordered payment of 12 annas only on account of the tax.

Held, that the Magistrate had no power to go behind the estimate of value framed by the managing committee under the powers given to it by the rules. He ought to have accepted as conclusive the amount found by the managing committee to be the letting value of the house, and held the legal liability of the accused to pay the tax based on this amount to be proved.

The remedy of the accused, if he considered his house assessed too highly, was to apply to the managing committee, and no other mode of redress was open to him.

Municipality of Ahmedabad v. *Jamna Punja* (1891) 17 Bom., 731) and *Imperatrix* v. *Nathu Hirachand* (Cr. Rul. 35 of 1891) distinguished.

MUNICIPALITY OF WA'I *v.* KRISHNAJI 446

MUNICIPALITY—*Water-works—Municipality of Bombay—Right to enter on land of Railway Company to lay pipes, &c.—Bombay Municipal Act (Bom. Act III of* 1888), *Secs.* 225, 265—*Railway Act* (*IX of* 1890), *Sec.* 12—*Accommodation works.*

See WATER-WORKS 358

NATIVE CHRISTIANS—*Law applicable to—Succession—Inheritance—Religion—Change of religion.*

See RELIGION 539

OFFICERS OF GOVERNMENT—*Jurisdiction of Mámlatdár over officers of Government sued in their official capacity—Act XIV of* 1869 *Sec.* 32—*Act X of* 1876, *Sec.* 15.

See MÁMLATDÁR 761

ONUS OF PROOF—*Adoption—Validity of adoption depending on whether natural son alive or dead—Deed or will conferring estate on a person described as adopted son—Evidence—Evidence Act* (*I of* 1872), *Secs.* 107, 108—*Person not heard of for seven years—Presumption of death* 296

PÁRSIS—*Marriage—Husband and wife—Suit by husband for restitution of conjugal rights—Defence to such suit—Agreement for separation a good defence—Pársi Marriage and Divorce Act* (*XV of* 1865), *Sec.* 36] Under section 36 of the Pársi Marriage and Divorce Act (XV of 1865) a contract by which a husband has agreed to allow his wife to live separate is a good defence to a subsequent suit by him for restitution of conjugal rights.

KAWASJI *v.* SIRINBAI 279

PARTIES—*Practice—Civil Procedure Code* (*Act XIV of* 1882), *Sec.* 28—*Execution—Civil Procedure Code* (*Act XIV of* 1882), *Secs.* 278—83—*Attachment of same property in execution of decrees obtained by different creditors—Claim made in one suit to attached property under section* 278—*Order made under section* 281—*Suit by claimant to establish right—All attaching creditors made defendants to suit.*

Held, that the plaintiff might join in one suit, as defendants, persons who had decrees against different persons. The right to relief was in respect of the same matter and, therefore, fulfilled the requirements of section 28 of the Civil Procedure Code, 1882).

RAGHUNATH MUKUND *v.* SAROSH K. R. KAMA 266

PARTITION—*Alienation by co-parceners—Possession by alienee—Adverse possession—Limitation—Limitation Act* (*XV of* 1877, *Sch. II, Arts.* 127 *and* 144.] Where co-parceners have alienated their shares in the joint property by sale and mortgage, and the alienees have been in possession for more than twelve years, a claim for partition is, as against such alienees, barred by limitation under Article 144 of the Limitation Act (XV of 1877).

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Pandurang v. *Bhaskar* (11 Bom. H. C. R., 72) distinguished.

Article 127 of Schedule II of the Limitation Act (XV of 1877) does not apply except in cases between members of a joint family. It does not apply to the case of a stranger to the family holding property which originally belonged to the family. As to him the ordinary rule of limitation (article 144) applies.

BHAVRAO *v.* RAKHMIN 137

PARTITION—*Co-sharer—Mortgage by co-sharer of undivided share—Partition suit subsequently brought by other co-sharer to which mortgagee not a party—Mortgaged property allotted to a sharer other than mortgagor—Rights of such co-sharer—Partition re-opened—Fraud of mortgagor and mortgagee.*] Four brothers, *viz.*, Damodar, Lakshman, Balvant and Parashram, were joint owners of certain land. For purposes of convenience each was in possession of a certain portion, but there was no formal partition. The particular land in question in this suit (Pot Nos. 1 and 2 of Survey No. 174) was a part of the land in possession of Balvant. In 1867, without the knowledge of his brothers, Balvant mortgaged these plots of land to the first defendant for Rs. 2,800. In 1886 Damodar sued for partition of the whole property, and in 1891 Lakshman brought a similar suit. By the decrees in these suits, Pot No. 1 was allotted to Damodar and Pot No. 2 was awarded to Lakshman. The mortgagee was not a party to either suit, the plaintiffs in these suits (as found by the High Court) having had no notice of the mortgage. Damodar and Lakshman, on attempting to get possession of the lands allotted to them respectively by the partition decrees, were obstructed by the mortgagee, and now brought these suits against him and the heirs of Balvant (defendants Nos. 2—9), claiming possession of the lands allotted to them free of the mortgage-debt, or that the partition should be re-opened, and that unencumbered land should be allotted to them and the mortgaged land given to Balvant's branch of the family (defendants Nos. 2—9).

Held, that the partition should be re-opened and the mortgaged land assigned to the defendants Nos. 2—9.

Where a co-sharer of joint property has mortgaged his share without the knowledge of his co-sharers, and there has subsequently been a partition suit to which, through the fraud of the mortgagor and the mortgagee, the latter has not been made a party, he (the mortgagee) will only be allowed to proceed for the recovery of his mortgage-debt against that portion of the property which has been allotted to his mortgagor.

Hem Chunder v. *Thako Moni Debi* ((1893) 20 Cal., 533) approved.

LAKSHMAN *v.* GOPAL 385

———*Mahomedan law—Practice—Procedure—Joint property—Suit for share of such property—Share allotted to defendant in same suit on payment of court-fees.*] In the Presidency of Bombay a suit for partition of an inheritance by Mahomedans is hardly distinguishable from a partition suit by Hindus. In such a suit, if a defendant asks at the proper time to have his share divided off and allotted to him, such relief should be granted to him on payment of the necessary court-fees.

ABDUL KADAR *v.* BAPUBHAI 188

———*Partition Act (IV of 1893), Sec. 3, Sub-sec. 2, 4—Suit by transferee for partition—Suit for partition by sharer against transferee—Procedure.*] Section 4 of the Partition Act (IV of 1893) applies only where the transferee sues for partition.

Where the suit is brought by the sharer against the transferee, section 2 must be applied.

In cases where section 4 applies, the Judge should make a valuation of the share of the transferee only and direct its sale.

BALSHET *v.* MIRANSHET ... ...

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PARTITION—*Partition Act IV of 1893 Sec. 4—Application of section—Dwelling-house belonging to undivided family—Re-acquisition by members of such family after it has been sold to a stranger does not give a right under the section as against such stranger.*] A dwelling house belonged to four brothers, Krishnaji, Ramchandra, Vaman and Parashram, joint members of a Hindu family. In 1871 the shares of Krishnaji and Parashram were sold in execution of decrees against them, and in 1877 the remaining shares were sold, and finally the house became the property of the plaintiff and one Karandikar in equal moieties. The plaintiff sued Karandikar for partition and obtained a decree, but pending execution Karandikar conveyed his moiety back again to Ramchandra and Vaman. The brothers had continued to occupy the house notwithstanding the changes in ownership. Vaman now applied under section 4 of the Partition Act (IV of 1893) to be allowed to buy the plaintiff's moiety.

Held, that he was not entitled to the advantage given by the section. It is ownership, not occupation, that gives the right. After the sales in 1877 the house no longer belonged to an undivided family. Vaman and his brothers were then either tenants in the house or trespassers. The question was whether the dwelling-house at the time the shares therein, which had not been sold to Karandikar, were transferred to the plaintiff belonged to an undivided family. When the plaintiff purchased his moiety, he and Karandikar became the owners in common of the house, and as between them section 4 of the Partition Act had no operation. The subsequent purchase of Karandikar's interest by Ramchandra and Vaman did not confer upon them any rights which Karandikar did not possess. It was in their hands re-acquired ancestral property, but not property belonging to an undivided family within the meaning of section 4.

VAMAN *v.* VASUDEV 73

———*Son born after partition—Right of such son to partition—Share of such son—Family arrangement—Limitation—Hindu law.*] In the year 1875, one Venkatrav having at that time three sons, *viz.*, defendants Nos. 1, 2 and 3, divided his property, allotting one-third to the first defendant and retaining the remaining two-thirds in his own possession in the interest of his other two sons (defendants Nos. 2 and 3) who were then minors. The latter continued to live with him, and he managed the property. The first defendant was the son of Venkatrav's elder wife and the second and third defendants were the sons of his younger wife. In 1880 the plaintiff was born and in 1891 he brought this suit by his mother (the younger wife) as next friend for a partition of the whole of Venkatrav's property, including that which in 1875 had been allotted to the first defendant. The plaintiff claimed a fourth share.

Held, that the plaintiff was not entitled to any part of the property which had been given to the first defendant in 1875. The family arrangement then made had been acquiesced in for more than twelve years and could not be disturbed. The plaintiff could not only claim against defendants Nos. 2 and 3, who lived with their father in union and with whom the plaintiff himself had lived as member of a joint family.

GANPAT *v.* GOPALRAO 696

———*Suit for partition by a purchaser from a co-sharer—Decree in such suit need not be for a general partition of the entire estate—Practice.*] When a purchaser from a co-sharer in a joint family estate sues to have his share severed and given to him, the Court is not bound to force the members of the family into a partition of the whole estate. It is, no doubt, open for each and every co-sharer to ask to have his share divided off and allotted to him (in which case he would have to pay court-fees according to his share). But, in the absence of such a request, the Court is not bound to determine what is the share of each of the co-sharers, and to compel him to take that share by making a general partition.

In such a case the High Court refused in second appeal to entertain the plea of some of the co-sharers, who had not appealed in the lower Courts, that certain properties have their shares divided out and allotted to them.

MURARRAO *v.* SITARAM 181

PARTITION—*Two suits for partition. First suit for partition of property [illegible] Second suit for partition of property [illegible] Civil Procedure Code (Act XIV of 1882), Sections [illegible]*] Two suits brought by some members of a family against the [illegible] family for partition of the joint family property [illegible] by the same plaintiffs for partition of other property [illegible] family and strangers.

PURSHOTTAM *v.* AIMARAM 207

PARTNERSHIP—*Death of partner—Sale of assets [illegible] partner—Suit by administrator of deceased partner [illegible] receiver's assets—Suit for partnership account [illegible] Sees. 7 and 17.*] In 1889, one Hemabai, a widow, [illegible] on business in partnership with Gokuldas and Bhagwandas [illegible] and 2) in Sind and at Behrin in the Persian Gulf, [illegible] then dissolved. She had no children, but it was alleged [illegible] Purshotam, the brother of the second defendant. On the 12th February 1894, the guardian of one Kissondas, a minor (her husband's [illegible] High Court of Bombay for letters of administration to her [illegible] Kissondas was her heir and next of kin. A caveat was filed by her father and others, in which they denied that Kissondas was [illegible] Purshotam had performed her funeral ceremonies. The matter came on as a suit on the 19th February 1894, when an order was made without prejudice to any of the questions raised by the issues, dismissing the application and ordering letters of administration to Hemabai's estate to issue to the Administrator General of Bombay. Letters of administration were accordingly granted to him on the 30th March 1894.

In the meantime, however, *viz.*, on the 12th April 1893, Bhagwandas (defendant No. 2) had filed three suits in the High Court of Bombay, in the name of himself and Gokuldas (defendant No. 1), as surviving partners of Hemabai's firm, to recover certain debts due to that firm. Disputes subsequently arose between Bhagwandas and Gokuldas, and, by a consent order of the 22nd July 1893, it was ordered that any money recovered in the said three suits should be paid over to a receiver (defendant No. 3) to be held by him until further order. On the 1st August 1893, consent decrees were passed in the above three suits for a total sum of Rs. 28,335, which was forthwith handed over to the receiver.

On the 22nd April 1894, this suit was filed by the Administrator General of Bombay as administrator of Hemabai appointed as above stated. He claimed to recover the whole sum paid to the receiver, alleging that the first and second defendants as her partners were largely indebted to the firm and that the money really belonged to her estate. He prayed that the receiver might be directed to pay over the money to him, and, if necessary, the partnership accounts should be taken. The second defendant (*inter alia*) pleaded that the suit was one for partnership accounts, and as such was barred by limitation, and also that the High Court of Bombay had no jurisdiction to try it.

Held by the Privy Council, affirming the decision of the High Court of Bombay, that this suit was not barred by time; the latter Court having decided on the ground that the Administrator General having been the only person capable of suing within the meaning of section 17 of Act XV of 1877 (Limitation), that section operated to allow the period of article 106 to be computed from the issue of administration of this estate.

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A decree was made for a general partnership account to establish what was due to the estate of the deceased in respect of her share in the partnership, and of any money of hers employed in the business continued by the survivors.
BHAGWANDAS v. RIVETT-CARNAC 511

PARTNERSHIP—*Partnership suit between members of joint family—Suit by a co-parcener for an account of the profits of a joint family firm—Injunction—Exclusion of partner—Hindu Law—Joint family—Family firm.*
See JOINT FAMILY 144

PARTY—*Appearance of party—Appearance by pleader or recognized agent—Appearance only for purpose of applying for adjournment—Civil Procedure Code (Act XIV of 1882), Secs.* 36, 37, 100, 102 *and* 103—*Presidency Small Cause Courts Act (XV of* 1882), *Sec.* 38—*Dismissal for default—Remedy of plaintiff—Practice—Procedure—Decree—Ex parte decree.* 1
See DECREE 414

PENAL CODE (ACT XLV OF 1860), SEC. 71—*Criminal Procedure Code (Act V of* 1898), *Sec.* 35—*Conviction of several offences at one trial—One sentence only to be passed in such cases—Sentence.*] Where a person commits house-breaking in order to commit theft, and theft he may be charged with, and convicted of, each of these offences. In awarding punishment under the provisions of section 71 of the Indian Penal Code (Act XLV of 1860) the Court should pass one sentence for either of the offences in question and not a separate one for each offence.

If in such a case two sentences are passed, and the aggregate of those does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, that would be an irregularity, and not an illegality, calling for the interference of a Court of Appeal or Revision.
QUEEN-EMPRESS v. MALU AND QUEEN-EMPRESS v. NAGU 706

PENSIONS ACT (XXIII OF 1871), SECS. 6 AND 11—*Rule* (6) *framed under the Act—Suit for recovery of varshasan allowance—Collector's certificate—Cancellation of certificate by Revenue Commissioner.*] When a certificate is granted by the Collector under section 6 of the Pensions Act (XXIII of 1871), the presumption is, until the contrary is shown, that the order for granting the certificate was made, as is contemplated by the 6th rule framed under the Act, with the previous sanction of the Revenue Commissioner by the Collector himself. But the Revenue Commissioner has no power vested in him to cancel a certificate granted by the Collector, and there is no rule which provides for the revision by the Revenue Commissioner of the Collector's action in granting certificates or for the cancellation by him of the certificates granted by the latter.
BHIMBHAI v. BHIKAMBHAI 676

PLEADER—*Appointment of a pleader to act as Presidency Magistrate—Appointment not forbidden by the Code—Criminal Procedure Code (Act V of* 1898), *Sec.* 557.
See CRIMINAL PROCEDURE CODE, 1898 490

PLEADER AND CLIENT—*Pleader's absence from Court owing to his temporary appointment as a Subordinate Judge—"Necessary cause"—Regulation II of* 1827, *Sec.* 54.] On the day fixed for the hearing of a suit, neither the plaintiff nor his pleader was present; the defendant not having been served was also absent. Plaintiff's pleader, however, sent intimation to the Court in writing that he had been appointed to act as a Subordinate Judge, and as he was going that day to join his appointment, he was unable to attend the Court. He, therefore, requested that the case should be adjourned till his return, or that a notice be issued to his client to enable him to make the necessary arrangements for the conduct of his case.

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Held, that the pleader, having been temporarily appointed to act as a Subordinate Judge, was unable to attend the Court in consequence of a "necessary cause" within the meaning of section 54 of Regulation II of 1827; and as he had sent the necessary notification in writing to the Court, the suit should not be dismissed, but adjourned for a reasonable time.

In re Narayan Sadashiv Kale 627

PRACTICE—*Appeal—Appeal from a decree in the nature of an award—Case referred to the decision of a Court, both parties agreeing to abide by such decision.*

Where both parties to a suit referred the matters in dispute between them to the Court, and agreed to abide by its decision, and the Court passed a decree awarding a certain sum to the plaintiff.

Held, that no appeal lay from the decree, the decision of the Court being in the nature of an arbitrator's award.

Sayad Zain *v.* Kalabhai 752

———*Appeal by defendants—Objections to decree filed by plaintiff—Subsequent withdrawal of appeal—Application by plaintiff for leave to appeal—Sufficient cause—Limitation Act (XV of* 1877), *Sec.* 5—*Civil Procedure Code (Act XIV of* 1882), *Sec.* 561.] The appellants (defendants) filed an appeal against the decree passed in this case on the 30th August 1898, and on the same day gave notice thereof to the respondents (plaintiffs), who on the 28th September, 1898, filed cross-objections to the decree under section 561 of the Civil Procedure Code (Act XIV of 1882). On the 2nd March, 1899, the appellants gave notice to the respondents that they would not proceed with the appeal. The respondents then applied to be allowed to appeal, alleging that they had from the first intended to appeal, but had not done so only because the other side had filed an appeal. That being so, they had merely filed cross-objections.

Held, that the application should be granted. It appeared that the applicants had intended to appeal and would have appealed, but for the fact that an appeal in the suit was already on the file. Under these circumstances the applicants showed "sufficient cause" for not filing their appeal within section 5 of the Limitation Act (XV of 1877), and were, therefore, not barred by limitation.

Hurgovindas *v.* Jadavahoo 692

———*Arbitration—Order of reference to arbitraton—Civil Procedure Code (Act XIV of* 1882), *Sec.* 506—*Jurisdiction—Absence of written authority to refer.*] By a Judge's order consented to by the plaintiff and defendant this suit was referred to arbitration on the 13th December 1898. In the following January and February two meetings were held before the arbitrator which were attended by the defendant and the managing clerk of his then attorney, and he took an active part in the proceedings. Subsequently the defendant changed his attorney and declined to proceed with the arbitration, contending that the order of reference was illegal, inasmuch as no special authority in writing was given by the parties to their attorneys to obtain the order, as required by section 506 of the Civil Procedure Code (Act XIV of 1882). He took out a summons to set aside the order.

Held (dismissing the summons) that the absence of a written authority did not invalidate the order of reference.

Luximibai *v.* Hajee Widina Cassum 629

———*Civil Procedure Code (XIV of* 1882) *Section* 28—*Parties—Small Cause Court—Jurisdicton—Declaratory decree—Civil Procedure Code (XIV of* 1882) Sections 278—283—Attachment of same property in execution of decrees obtained by different creditors—Claim made in one suit to attached property under section 278—Order made under section 281—suit by claimant to establish right—all attaching creditors made defendants to suit.

See Civil Procedure Code, Sections 278—283, and Parties ...

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PRACTICE—*Commission—Application by defendant (executor) to examine witnesses on commission—Civil Procedure Code (Act XIV of 1882), Chap. XXV.*] Where a defendant (executor applied for the issue of a commission to examine witnesses, the Judge having regard to the circumstances of the case and to the principles laid down in *Berden* v. *Greenwood* (1880) 20 Ch. D., 716, foot-note *,) refused the application.

MOWJI v. NEMCHAND 626

———*Criminal Procedure Code (Act V of 1898), Sections 269, Cl. 3, and 307—Jury—Trial by jury of an offence triable with the aid of assessors.*] The accused was tried by a jury on four charges: (1) forgery, (2) using a forged document, (3) criminal misappropriation, and (4) attempting to use a forged document as genuine. The jury returned a unanimous verdict of "not guilty" on all the charges. The Sessions Judge agreed with the jury in their verdict on the 1st, 2nd and 4th charges, but he differed from them on the 3rd charge, which was criminal misappropriation. This offence was not triable by a jury and ought, therefore, under clause 3 of section 269 of the Criminal Procedure Code (Act V of 1898), to have been tried by the Sessions Judge with the aid of the jurors as assessors. Nevertheless the Judge took the verdict of the jury upon this charge, and differing from it, referred the case to the High Court under section 307 of the Code.

Held, that although the procedure of the Sessions Judge was irregular, the trial by jury must be accepted as legal, and the case as one that could be referred to the High Court under section 307 of the Criminal Procedure Code.

QUEEN-EMPRESS v. JEJEBAM HARIBHAI 696

———*Minor—Guardian—Guardians and Wards Act (VIII of 1890), Sections 13, 46 and 39—Duty of District Court to hear all evidence—Decision based on evidence taken by a Subordinate Court illegal*] Section 46 of the Guardians and Wards Act (VIII of 1890) does not control section 13 of the Act, so as to authorize the District Judge to dispense with the hearing of evidence by himself and transfer the whole investigation of material issues of fact to a Subordinate Court. Nor does it empower the District Judge to use the evidence taken by the Subordinate Court.

An application was made for the appointment of a guardian to the person and property of a minor. The District Court sent the application to a Subordinate Judge for inquiry and report, and issued a notice calling upon any who objected to the appointment of the proposed guardian to appear before the Subordinate Judge, who would hear and dispose of the objections. The whole inquiry was held before, and all the evidence was taken by, the Subordinate Judge. Upon the evidence so taken, the District Judge disposed of the application.

Held, that the procedure adopted by the District Judge was illegal, and his decision based upon evidence not taken before him could not be accepted.

GANESH VITHAL v. KUSABAI 698

———*Procedure—Civil Procedure Code (Act XIV of 1882), Section 287—Execution—Sale in execution subject to mortgage—Suit to set aside sale and for re-sale of property free from mortgage.*] The plaintiff, having sold property in execution of a decree subject to a certain mortgage lien which had been duly investigated and allowed, brought this suit to have the sale set aside and praying for a re-sale of the property free from the mortgage lien.

Held, that he was not entitled to the relief sought. His proper remedy was to have brought a suit for a declaration that the alleged mortgage was null and void, and to have stayed the sale till the determination of that suit.

PARSHOTOM v. GANESH 759

———*Procedure—Decree—Ex-parte decree—Appearance of party—Appearance by pleader or recognized agent—Appearance only for purpose of applying*

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for adjournment—Civil Procedure Code (Act XIV of 1882, Sections 98, 57, 100, 102 and 103—Presidency Small Cause Courts Act XV of 1882, Section 38—Dismissal for default—Remedy of plaintiff. A suit and cross-suit between the same parties were on the board for hearing on the 2nd April, 1885. On that day A, the counsel who was instructed for the defendants in the first suit and for the plaintiffs in the second, was unable to attend, and B, another counsel, held his brief and appeared on his behalf and applied for two months' adjournment of both suits. The munim of his clients was then in Court. B was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused, and B said he withdrew from the case. Both suits were then and there disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed for non-appearance. On the 7th May following, an application was made for a re-hearing of both suits. The Court, regarding the decrees as *ex-parte* decrees, granted a rule for a new trial, which was made absolute. On appeal to the Full Court, the matter was referred to the High Court.

Held, that under the circumstances the suits were to be considered as having been disposed of under sections 100 and 102 of the Civil Procedure Code (Act XIV of 1882) respectively, and that whether or not they, or either of them, fell within the category of contested suits as defined by section 38 of the Presidency Small Cause Courts Act (XV of 1882), the remedy under section 103 of the Civil Procedure Code was open to the plaintiffs in the cross-suit.

Where on the day fixed for hearing a party is present in person merely for the purpose of applying for an adjournment which is refused, he must be taken to have "appeared" within the meaning of Chapter VII of the Civil Procedure Code. The party has appeared in person. The purpose for which he appeared, or the action which he took on appearance, are immaterial.

But where the party is absent and an application for adjournment is made on his behalf by a pleader who has no other instructions, and whose functions are at an end when the adjournment is refused, in that case the party has not appeared within the meaning of the chapter.

Where the pleader who applies for an adjournment is accompanied by a recognized agent of the party, but the latter neither makes any application, nor does any act, the question is whether he *intends* to appear and in fact does appear for the party in the exercise of his powers under section 36 of the Civil Procedure Code. That section is merely permissive and enabling. If the recognized agent, although able to do so, does not think proper to conduct the case on behalf of his principal, his mere presence in Court is not an "appearance" in the suit. An appearance may be made by a pleader or a recognized agent: but the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented.

Section 38 of the Presidency Small Cause Courts Act (XV of 1882) does not preclude a plaintiff whose suit has been dismissed for default from applying under section 103 of the Civil Procedure Code (Act XIV of 1882) to have the order of dismissal set aside. There is no inconsistency between the two sections. A plaintiff whose suit has been dismissed for default has two separate remedies under different enactments. If he chooses to apply for a new trial under section 38, he must do so within eight days. If he prefers to apply for an order setting aside the dismissal under section 103 of the Civil Procedure Code, he can do so within thirty days (Limitation Act XV of 1877, Schedule II, Art. 163.)

SOONDERLAL *v.* GOORPRASAD 414

PRACTICE—*Procedure—Lunatic—Guardian of the person of a lunatic not competent to sue in respect of the lunatics' estate—Civil Procedure Code (XIV of 1882) Section 440—Guardian—Right to one.* A guardian of the person only of a lunatic has no right to bring a suit in respect of the lunatic's estate. The manager of the lunatic's estate is the only person who can institute such a suit.

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The word "guardian" in section 440 of the Civil Procedure Code (Act XIV of 1882) as amended by Act VIII of 1890, when applied to a lunatic means the manager of his estate. Under this section a person other than the guardian of the estate can also sue with the leave of the Court.

BAI DIVALI *v.* HIRALAL 463

PRACTICE—*Procedure—Witness—Accused person calling as witnesses persons charged with him and awaiting a separate trial for same offence—Criminal Procedure Code (Act V of 1898), Section 342, Cl. 4—Evidence Act (I of 1872), Section 132.*] The accused D, a European British subject, was charged together with others who were natives of India, under sections 384, 385 and 389 of the Penal Code (Act XLV of 1860) with conspiring to commit extortion. D claimed to be tried by a mixed jury under section 450 of the Criminal Procedure Code (Act V of 1898). The other accused, who were natives of India, then claimed to be tried separately under section 452. The trial of D then proceeded, and at the close of the case for the prosecution he proposed to call as his witnesses the persons who had been charged with him and who were awaiting their trial. They objected to be called.

Held, that he was entitled to call them as witnesses and to examine them on oath.

The words "the accused" in clause 4 of section 342 of the Criminal Procedure Code (Act V of 1898) mean the accused then under trial and under examination by the Court.

QUEEN EMPRESS *v.* DURANT 213

———*Procedure when suit filed in wrong Court—Dekkhan Agriculturists' Relief Act (XVII of 1879) Section 11—Civil Procedure Code (Act XIV of 1882), Section 57)—Jurisdiction.*] Under section 11 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), a suit in which there are several defendants who are agriculturists may be instituted and tried in a Court within the local limits of whose jurisdiction any one of such defendants resides and not elsewhere.

Where a suit was brought in the Court at Haveli, the plaintiffs, alleging that some of the defendants who held lands within the jurisdiction of that court were agriculturists, and the suit was dismissed because those defendants were found not to be agriculturists.

Held, that the proper procedure to be adopted in such a case was not to dismiss the suit, but to return the plaint for presentation to the proper Court.

LADHAJI *v.* HARI 679

———*Security for cost—Infant female plaintiff—Civil Procedure Code (Act XIV of 1882), Section 380*]. Unless in exceptional cases, neither an infant female plaintiff nor her next friend ought to be required to give security for costs.

BAI POREBAI *v.* DEVJI MEGHJI 100

RAILWAY—*Railways Act (IX of 1890) Section 12—Accommodation works—Water-works—Municipality of Bombay—Right to enter on land of Railway Company to lay pipes, &c.—Bombay Municipal Act (Bombay Act III of 1888), Sections 222,-65.* Under the Bombay Municipal Act (Bombay Act III of 1888) the Corporation of Bombay has the right, for the purpose of supplying the city with water, to enter upon land belonging to other owners, to make connections between the mains, and to lay the pipes forming the connections through or under such lands without the owners' permission, though not without giving them reasonable notice in writing.

Held, also, that section 12 of the Railways Act (IX of 1890) does not exclude the above right of the Corporation of Bombay to enter on land belonging to the G. I. P. Railway Company for the said purposes.

G. I. P. RAILWAY COMPANY *v.* MUNICIPAL CORPORATION OF BOMBAY ... 358

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REDEMPTION—*Decree for redemption—No time fixed in the decree for payment—Execution—Limitation—Limitation Act (XV of 1877), Art. 179—Mortgage.*
See LIMITATION 592

RELIGION—*Native Christians—Change of religion—Law applicable to converts—Succession—Inheritance.*] Where, in consequence of the conversion of a person from one form of religion to another, the question arises as to the law to be applied to such person, that question is to be determined not by ascertaining the law which was applicable to such person prior to the conversion, but by ascertaining the law or custom of the class to which such person attached himself after conversion and by which he preferred that his succession should be governed.
LASTINGS *v.* GONSALVES 539

RES JUDICATA—Execution—Orders in execution proceedings—withdrawal of application for execution—effect of such withdrawal—"Date of issuing notice" meaning of the words—Execution of decree—Limitation Act (XV of 1877,) Art 179, clause 5.

Orders in execution proceedings, if not appealed from, are binding on the parties to the suit in all subsequent proceedings in that suit, on principles analogous to those of *res judicata* strictly so called. It is, therefore, necessary to constitute a bar that there should be a hearing and final decision.

Where an application for execution is allowed to be withdrawn, the matters in dispute are not heard and decided. There is, therefore, no *res judicata.*
HARI *v.* YAMUNABAI 31

———*Former decree in favour of plaintiff, but issue as to adoption found against him.*
See ADOPTION 296

———*Suit by C for mesne profits as devisee of land under will of A—Will held valid and C's claim allowed—Application by C as legal representative of A for execution of decree obtained by A—Question of validity of will again raised—Civil Procedure Code (Act XIV of 1882), Section 244.*] A obtained a decree against B for possession of certain land, and then died. Thereupon C applied for execution of the decree as A's legal representative, relying upon a will made by A in his favour. At the same time, C filed a suit to recover Rs. 140 as mesne profits of the land. The execution proceedings were stayed till after the disposal of the suit for mesne profits. In this suit B contended that the will in question was not executed by A, and that A was not of sound disposing mind at the time of the alleged execution of the will. The Subordinate Judge found on both these points against B and passed a decree for mesne profits. This decree was upheld, on appeal, by the District Judge.

After the decision of this suit, the Subordinate Judge took up C's application for execution of the original decree obtained by A. This application was resisted by B on the same grounds on which he had defended the suit for mesne profits. He impeached the validity of the will on the grounds of non-execution by, and unsoundness of mind of, the testator. The Subordinate Judge held that the matter was *res judicata*; he, therefore, overruled this objection, and ordered execution to issue. The District Judge held that as the suit for mesne profits was in the nature of a Small Cause suit, in which there was no second appeal, the decision passed in that suit did not operate as *res judicata* in the present execution proceedings. He, therefore, reversed the Subordinate Judge's order and remanded the case for a fresh decision.

Held, reversing the remand order, that the question whether C was entitled to execute the decree as A's representative fell within the last clause of section 244 of the Code of Civil Procedure (Act XIV of 1882). The Subordinate Judge, who had raised an issue as to the validity of the will relied upon by C in the suit for mesne profits, was entitled to act upon his determination of that issue in the execution proceedings.
BHAVANISHANKAR *v.* NARANSHANKAR. ... ...

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RESTITUTION OF CONJUGAL RIGHTS—*Husband and wife—Maintenance order obtained by a wife against husband—Subsequent decree for restitution of conjugal rights obtained by husband—Effect of such decree on previous order of maintenance—Criminal Procedure Code (Act X of 1882), Section 488—Maintenance.*

See MAINTENANCE 484

———*Husband and wife—suit for possession of wife—Wife herself defendant—Limitation—Limitation (Act XV of 1877), Sch. II, Art. 35—Demand and refusal—Continuing cause of action—Limitation Act (XV of 1877), Section 23.*

See HUSBAND AND WIFE 307

RESTRAINT OF TRADE—*Contract Act (IX of 1872), Sec. 27—Injunction—Contract in Zanzibar—Contract for personal service—Contract not to practise as physician—Construction.*] A agreed on certain terms to become assistant for three years to B, who was a physician and surgeon practising at Zanzibar. The letter (Exhibit B), which stated the terms which B offered and which (as the Court found) A accepted, contained the words "the ordinary clause against practising must be drawn up" At the end of a year a disagreement took place and A ceased to act as B's assistant and began to practise in Zanzibar on his own account. B sued for an injunction to restrain him.

Held, that B was entitled to an injunction restraining A from practising in Zanzibar on his own account during the period of three years.

CHARLESWORTH *v.* MACDONALD 103

RESUMPTION—*Service lands—Mere non-performance of service does not make the holding adverse—Adverse possession.*—Limitation.

See SERVICE LANDS 602

REVERSIONER—*Limitation—Limitation Act (XV of 1877) Secs. 10 and 28, Articles 120, 141 and 144—Will—Hindu Law—Dharam—Bequest for Dharam.*

See WILL 725

RIPARIAN OWNERS, RIGHTS OF—*Mámlatdár—Jurisdiction—Mámlatdárs' Act (Bom. Act III of 1876), Sec. 4—Water—Water-course.*

See WATER 506

———*Water-course—Bombay Irrigation Act (Bom. Act VII of 1879) Sec. 48—Leakage water.*

See IRRIGATION ACT 761

SALT ACT (BOM. ACT II OF 1890), SEC. 47 (A)—*Possession of salt water with the intention of manufacturing salt.*

The mere possession of salt water with the intention of manufacturing salt therefrom is not an offence under the Bombay Salt Act (Bom. Act II of 1890).

QUEEN EMPRESS *v.* DABHAI KABHAI 788

SENTENCE—*Alteration of sentence—Criminal Procedure Code (Act X of 1882), Sec. 423—Appellate Court—Powers of Appellate Court to enhance sentence.*

See CRIMINAL PROCEDURE CODE 439

———*Indian Penal Code (Act XLV of 1860), Sec. 71—Criminal Procedure Code (Act V of 1898), Sec. 35—Conviction of several offences at one trial—one sentence only to be passed in such cases.*

See CRIMINAL PROCEDURE CODE 706

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SERVICE LANDS—*Mere non-performance of service does not make the holding adverse—Adverse possession—Limitation—Resumption.*] Where lands are held as remuneration for services, the fact that no services have been performed does not of itself make the holding adverse. To make the holding adverse there must be a refusal to perform service or a claim to hold the lands free of service.
KOMARGOWDA v. BHIMAJI 602

SHIPPING—*Charter-party—Bill of lading—Freight—Rate of freight in charter-party—Contract by sub-charterer with shipper for freight at lower rate—Refusal by captain to sign bills of lading at lower rate than rate in charter-party—Payment by shipper of difference under protest.*] On 3rd March 1898, Karamsi Dharsi and Co., a firm of freight jobbers in Bombay, contracted to provide the plaintiffs with freight for 3,000 tons of cargo to Liverpool at 16*s.* 6*d.* per ton in a steamer to be subsequently named, and on the same day handed to the plaintiffs three shipping orders addressed to the captain of the ship, the name of which was to be afterwards inserted. In these shipping orders the higher and lower rate clause was as follows:—"Bill of lading if required at lower or higher rate, difference payable here as customary." This clause the plaintiffs struck out from each of the shipping orders according to their usual practice. On 11th May 1898, the defendants chartered the steamship "Paddington" of which they were also the owners' agents in Bombay, and on the 12th May assigned a half share of their interest under the charter-party to Karamsi Dharsi and Co. By the charter-party a full and complete cargo was to be loaded, and the freight was to be £1-10 per ton. The captain, however, was authorized to sign clean bills of lading at any rate of freight required by the charterers without prejudice to the charter-party, but at not less than the chartered rate, unless the difference was paid in cash before sailing.

Karamsi Dharsi and Co. having thus sub-chartered the "Paddington" declared that steamer to the plaintiffs for 2,717 tons of cargo under their contract of the 3rd March 1898, and the name of the steamer was then entered in the shipping orders for that amount of cargo. The plaintiffs thereupon commenced to load a cargo of wheat. By the 21st June, 2,100 tons had been put on board; mate's receipts were given to the plaintiffs and bills of lading were prepared by them, stating the rate of freight to be 16*s.* 6*d.* per ton as per the shipping orders, and were presented for signature to the captain. He refused to sign them unless the difference between 16*s.* 6*d.* and the chartered rate, *viz.*, £1-10, was paid to him as provided in the charter-party. The plaintiffs thereupon refused to ship any more cargo and demanded the return of the cargo already shipped on board the "Paddington." On the 24th June the "Paddington" sailed from Bombay, the captain having previously authorized the defendants to sign bills of lading for him after his departure provided they were in accordance with the charter-party. After some delay the plaintiffs on the 29th June accepted bills of lading for the 2,100 tons at £1-10 and paid under protest the difference between that rate and their contract rate (16*s.* 6*d.*) and certain other sums for which the defendants as agents for the owners claimed a lien. The plaintiffs now sued to recover from the defendants the amount so paid under protest. The defendants contended that as agents for owners they were justified in refusing to give bills of lading until the sums due and for which they claimed a lien were paid.

Held, that the defendants had no lien for the sums paid and that the plaintiffs were entitled to recover the amount claimed.

Per CANDY, J.:—The plaintiffs were entitled upon demand to have the said 2,100 tons re-delivered to them by the captain. On 29th June the plaintiffs were entitled to clean bills of lading at 30*s.*, and the sum paid by them under protest in order to obtain such bills of lading was recoverable by them. Under the circumstances the defendants had no lien for freight and demurrage.

Per STARLING, J.:—The captain was justified in refusing to re-deliver the said 2,100 tons. The plaintiffs were entitled to clean bills of lading at 30*s.*, and

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there was no lien for freight and demurrage in respect of which the plaintiffs had paid under protest the sum claimed by defendant.
RALLI BROTHERS v. CHABILDAS LALLUBHAI 551

SMALL CAUSE COURT—*Appeal from Order—Decree*.
See CIVIL PROCEDURE CODE, SECS. 578-579 266

Small Cause Courts Act, Provincial (IX of 1887), Sec. 25—Civil Procedure Code Act XIV of 1882, Sec. 206—Decree not according to law—Substantial injustice—Interference under extraordinary jurisdiction.] The plaintiff, a Hindu widow, sued for Rs. 714-0, being the balance due on an account. She called six witnesses to prove her claim. The defendant did not appear to defend the suit. The Judge, however, dismissed the suit, the only judgment recorded by him being as follows:—"Claim not proved. Claim rejected with costs." The plaintiff thereupon appealed to the High Court under its extraordinary jurisdiction, and the above decree was set aside, and a decree passed for the plaintiff with costs.

Held, that the decree being founded on a judgment not in accordance with section 203 of the Civil Procedure Code (Act XIV of 1882), was not according to law, and, therefore, the High Court under section 25 of the Provincial Small Cause Courts Act (IX of 1887) had jurisdiction to pass such order in the matter as it thought fit.

Per FARRAN, C. J.:—In a case where there is nothing to excite suspicion, and where the plaintiff had given such proof of her claim as the law requires, the plaintiff is entitled, and this Court is entitled, to have some indication from the Judge of the point upon which he dismisses the suit, to show that he is not acting from mere caprice or in ignorance of the rules of law which regulate the proof requisite to establish a plaintiff's claim.

Per FULTON, J.:—The ground on which I would base our decision is that the error under section 203 brings the case within our jurisdiction, and that the case being thus before us we are entitled, on being convinced that a failure of justice has occurred, to pass an order which will rectify the mistake.
BAI JASODA *v.* BAMANSHA 334

SMALL CAUSE COURT ACT (XV OF 1882), SEC. 38—*Dismissal for default—Remedy of plaintiff—Practice—Procedure—Decree—Ex-parte decree—Appearance of party—Appearance by pleader or recognized agent—Appearance only for the purpose of applying for adjournment—Civil Procedure Code (Act XIV of 1882), Secs.* 36, 37, 100, 102, 103.

Section 38 of the Presidency Small Cause Courts Act (XV of 1882) does not preclude a plaintiff whose suit has been dismissed for default from applying under section 103 of the Civil Procedure Code (Act XIV of 1882) to have the order of dismissal set aside. There is no inconsistency between the two sections. A plaintiff whose suit has been dismissed for default has two separate remedies under different enactments. If he chooses to apply for a new trial under section 38, he must do so within eight days. If he prefers to apply for an order setting aside the dismissal under section 103 of the Civil Procedure Code, he can do so within thirty days (Limitation Act XV of 1877, Schedule II, Art. 163).
GONDERIAL *v.* GOORPRASAD 414

SPECIFIC RELIEF ACT (I OF 1877), SEC. 9—*Right of way—Immoveable property—Right of way is not immoveable property within the meaning of Section 9 of the Act.*] A right of way is not "immoveable property" within the meaning of section 9 of the Specific Relief Act (I of 1877).
MANGALDAS *v.* JEWANRAM 673

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SPECIFIC RELIEF ACT (I OF 1877), SEC. 39—*Limitation Act (XV of 1877), Sch. II. Art. 91—Suit to cancel a void or voidable instrument—Reasonable apprehension of serious injury—Limitation.*] Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it cancelled. The test is "reasonable apprehension of serious injury." Whether that exists or not, depends upon the circumstances of each case. It cannot be laid down, as a rule of law, that in no case can a man, who has parted with the property in respect of which a void or voidable instrument exists, sue to have such instrument cancelled.

Iyyappa v. *Ramalakshmamma* ((1890) 13 Mad., 549) referred to.

KOTRABASSAPPAYA *v.* CHUNVIRAPPAYA 375

STAMP ACT (I OF 1879), SEC. 3 (17)—*Receipt—Memorandum of payment—Document containing no acknowledgment of payment not a receipt—No stamp necessary for such document.*] A made a payment of Rs. 22 to B. At A's request C made a memorandum in writing to the following effect:—"B has received Rs. 22," but affixed no stamp to it. He was charged and convicted, under section 61 of the Indian Stamp Act (I of 1879), for not affixing a receipt stamp to the memorandum.

Held, (reversing the conviction) that the memorandum was not a receipt. To constitute a receipt within the meaning of section 3 (17) of the Stamp Act, there must be an acknowledgment, either express or implied, of the receipt, and not a mere statement that money was received.

IN RE JAMNADAS HARINARAN 54

SUCCESSION—*Inheritance—Religion—Native Christians—Change of religion—Law applicable to converts.*] Where, in consequence of the conversion of a person from one form of religion to another, the question arises as to the law to be applied to such person, that question is to be determined not by ascertaining the law which was applicable to such person prior to the conversion, but by ascertaining the law or custom of the class to which such person attached himself after conversion and by which he preferred that his succession should be governed.

LASTINGS *v.* GONSALVES 539

SURETY—*Father's liability as surety—Liability of his sons for the debt for which he was surety—Hindu law—Joint family.*

See HINDU LAW 454

———*Limitation Act (XV of 1877), Sch. II, Art. 179, Expl. 1—Liability of surety in execution—Application for execution against a surety when a step in aid of execution against a principal—Mode of enforcing payment against a surety—Practice—Procedure.*] Vinayak Ramchandra was awarded the sum of Rs. 4,951-13-11 by the District Judge as compensation for land taken up by the Collector under the Land Acquisition Act, 1870. The money was ordered to be paid over to him on his giving security for its refund in case the appellate Court so ordered. Damodar Viziarangam thereupon became his surety and executed a bond binding himself to pay into Court the said sum of Rs. 4,951-13-11, if ordered by the Court. On the 25th September 1893, the Hight Court varied the order of the District Court and awarded Rs. 4,201-7-11 (part of the Rs. 4,951-13-11) to another claimant Kusaji Ramji (the appellant). On 17th February 1894, Kusaji applied for execution of this order against the surety Damodar and claimed also interest (Rs. 1,635-10-0) and costs (Rs. 550-15-4). Damodar objected to pay interest or costs, and the High Court held that, as surety, he was liable only for the principal sum, but not to interest or costs. Subsequently, *viz.*, on the 16th February 1897, Kusaji applied for execution against the principal debtor Vinayak of the order of the 25th September 1893, in respect of the interest and costs, contending that his application of the 17th February 1894, against the surety was a

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step in aid of the execution of the order under article 179 of the Limitation Act (XV of 1877) and prevented limitation.

Held, that his application was barred by limitation. The application for execution against the surety would not operate to keep alive the order as against the principal debtor unless it was made to enforce a liability which was common to both under the order. But under the order the surety was not liable for interest or costs. His liability was expressly confined by his bond to the principal sum, and it was only as to that sum that he was jointly liable with Vinayak. The previous application, therefore, for execution against the surety for money for which he was not liable under the order, could not be regarded as a step in aid of execution against the principal debtor Vinayak.

The mode of enforcing payment against a surety is by summary process in execution and not by separate suit.

KUSAJI *v.* VINAYAK 178

TEMPLE—*Trustee—Constructive trustee—His liability—Right to sue—Limitation—Civil Procedure Code (Act XIV of 1882), Sec. 539—Public, religious and charitable trust—Charity—Hindu temple, with a dharmashila and sadavart attached to it.*

See CIVIL PROCEDURE CODE 659

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 69—*Town of Bombay, Limits of.*] Land situate in the district of Mahim within the island of Bombay and within the local limits of the original jurisdiction of the High Court is situate within the town of Bombay in the sense in which that expression is used in section 69 of the Transfer of Property Act (IV of 1882).

TRIMBAK GANGADHAR RANADE *v.* BHAGWANDAS 348

———SEC. 89.—*Dekkhan Agriculturists' Relief Act (XVII of 1879), Sec. 44.—Agreement filed under section and becoming a decree—Default in payment of instalments due under decree—Application to make decree absolute under Section 89 of Transfer of Property Act (IV of 1882)—Limitation Act (XV of 1877), Sch. II, Art. 179.* On the 21st October 1894, the plaintiff and the defendant entered into an amicable agreement before a conciliator for payment of a mortgage-debt due to the former by annual instalments. The agreement was forwarded to the Court on the 21st December, 1894, to be filed under section 44 of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879). Default having been made in the payment of the instalments, the first of which became due on the 25th January 1895, and which also was not paid, the plaintiff applied for execution by sale of the mortgaged property. The application was made on the 6th September 1897, and it was struck off the file for some formal defect on the 18th November 1897. Subsequently on the 10th October 1898, the plaintiff having applied for an order absolute for sale under section 89 of the Transfer of Property Act (IV of 1882), questions arose as to the applicability of the section to agreements filed in Court under section 44 of the Dekkhan Agriculturists' Relief Act and as to limitation.

Held, that (1) agreements filed under section 44 of the Dekkhan Agriculturists' Relief Act, if relating to sale of mortgaged property, are subject to the provisions of section 89 of the Transfer of Property Act (IV of 1882).

(2) Article 179, Schedule II, of the Limitation Act (XV of 1877) applies to applications under section 89 of the Transfer of Property Act.

Held, further, that in the present case the application of September 1897 should be treated as a step in aid of execution.

BHAGAWAN *v.* GANU 611

———SEC. 108, *Cl.* (*c*)—*Contract Act (IX of 1872), Sec. 65—Landlord and tenant—Lease for a year—Whole rent*

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paid in advance—Destruction of premises before expiration of lease—Right of tenant to a refund of rent paid in advance—Apportionment.

See LANDLORD AND TENANT 15

TREES—*Right to cut trees—Khoti Khasgi land in the Ratnágiri District—Dunlop's proclamation—Construction—Crown grant—Right to rescind Khoti.*] Defendants were *khots* of the village of Ojharkhol in the Ratnágiri District, of which a certain plot (Survey No. 52) was their *khoti khasgi* land. In 1894 they cut down a large number of teak trees growing on this land. Thereupon the Secretary of State for India in Council sued to recover their value, alleging that they were the property of Government.

Defendants pleaded that they were the absolute owners of the trees, and relied in support of their title on a proclamation issued by Government in 1874, known as Mr. Dunlop's proclamation. This proclamation had been subsequently rescinded by Government in 1851. The material part of Mr. Dunlop's proclamation was in the following terms:—

"Upon the teak and other trees that may be on any person's land, Government has no design. He whose trees may now exist, or he whose trees may hereafter grow, may make such use of them as he pleases. Government will not offer the slightest obstruction."

Held, that this proclamation was not a mere promise, but an actual grant or gift of the teak trees to the persons on whose lands they were then actually growing, or might thereafter grow, and that the gift could not be revoked.

Held, also, that by reason of this proclamation Government had no right to the teak trees growing on the land in question.

SECRETARY OF STATE FOR INDIA *v.* SITARAM SHIVRAM 518

UNIVERSITY—*University of Bombay—Act XXII of* 1857, *Sec.* 12—*Construction—Candidate for a degree.*] The words "candidate for a degree" in section 12 of the Act (XXII of 1857) to establish the University of Bombay mean a candidate for the final examination, the passing of which entitles him to a degree. They do not mean a candidate for a degree at any stage of his University career. Students, therefore, presenting themselves for the Previous Examination prescribed by the Senate of the Bombay University need not present the certificate required by that section.

IN THE MATTER OF DARASHA RUSTOMJI COLABAWALLA 465

VALUATION—*Court Fees Act (VII of* 1870), *Sec.* 7, *Cl.* 10 (*a*), *Cl.* 4 (*c*), (*d*), *Sec.* 12—*Class to which a suit belongs—Decision as to such class—Appeal—Practice.*] An appeal lies against a decision as to the class to which a suit belongs although it does not lie against a decision as to the valuation of the suit in that class. A decision of the lower Court, holding that a suit is one for specific performance of a contract of sale and to be valued according to the amount of the consideration-money, is appealable.

DADA *v.* NAGESH 486

VATAN—*Daughter of a vatandár not a vatandár of the same vatan during her father's life-time—Bombay Act III of* 1874, *Sec.* 5—*Bombay Act V of* 1886.] The daughter of a Hindu vatandár is not during the life-time of her father a vatandár of the same vatan within the meaning of section 5 of Bombay Act III of 1784, as amended by Bombay Act V of 1886.

MUKTABAI *v.* ANTAJI 715

VENDOR AND PURCHASER—*Contract of sale—Non-payment of purchase-money—Suit for possession by vendee who has not paid the purchase-money—Remedy of vendor—Limitation—Limitation Act (XV of* 1877), *Sch. II, Art.* 47.] The plaintiffs owned land on which the defendant, with the plaintiffs' leave, built

a house. Disputes arose between plaintiffs and defendant, and in February 1893, the defendant obtained an order from the Mámlatdár in a possessory suit against the plaintiffs directing the plaintiffs to give up possession of the property to him. In August 1893, an agreement was made between them, in pursuance of which the defendant executed a rent-note to the plaintiffs promising to give up the property to the plaintiffs at the end of four months on payment by the plaintiffs of Rs. 100. On the 25th November 1896, the plaintiffs brought this suit for possession, alleging that the defendant refused to give up the property. The District Judge dismissed the suit, finding that the plaintiffs had not paid the Rs. 100, and holding that the defendant was, therefore, justified in putting an end to the contract contained in the rent-note. He further held that the suit was barred by limitation not having been brought within three years from the date of the Mámlatdár's order of 28th February 1893 (see Limitation Act XV of 1877, Sch. II, Art. 47).

Held (reversing the decree) that the evidence showed the transaction to be a sale of the property by the defendant to the plaintiff for Rs. 100, possession being given to the plaintiff under the lease for four months; that the sale was a completed transaction although the Rs. 100 had not been paid, and that the only remedy of the defendant was to sue for the amount.

Held, also, that the contract between the parties dissolved the order of the Mámlatdár in the possessory suit and rendered it unnecessary for the plaintiffs to sue to set it aside. The present suit, which was based on the contract of sale, was, therefore, not barred by article 47 of the Limitation Act.

SAGAJI *v.* NAMDLV 525

VENDOR AND PURCHASER—*Deposit—Right of purchaser to return of deposit—Lien of purchaser for the part of the purchase-money paid by him.*] A purchaser of land who has paid part of the purchase money by way of deposit, but who afterwards unjustifiably repudiates the contract of purchase, or is guilty of any default by reason of which the sale is not carried out, is not entitled to recover the deposit from the vendor.

The vendor is not necessarily entitled to retain the deposit merely because under the circumstances, the Court refuses to grant specific performance against him.

From the moment part of the purchase-money is paid, the purchaser has a lien upon the property to that extent, which lien can only be lost to him by reason of his failing to carrying out his part of the contract.

BALVANTA *v.* BIRA 56

WATER—*Water-course—Riparian owners, rights of—Mámlatdár—Jurisdiction—Mámlatdár's Act* (*Bom. Act III of* 1876), *Sec.* 4.] The law as to riparian owners is the same in India as in England, and is stated in illustration (*h*) of section 7 of the Easements Act (V of 1882). Each proprietor has a right to a reasonable use of the water as it passes his land, but, in the absence of some special custom, he has no right to dam it back, or exhaust it, so as to deprive other riparian owners of like use.' ... ...

What would constitute an unreasonable diversion of water such as to disturb the use of the lower riparian owners, is a question of fact which the Legislature has given a Mámlatdár jurisdiction to decide.

NARAYAN *v.* KESHAV 506

WATER COURSE—*Bombay Irrigation Act* (*Bom. VII of* 1879), *Sec.* 48—*Leakage water—Rights of riparian proprietors.*

See IRRIGATION ACT, MÁMLATDÁR 761

WATER-WORKS—*Municipality of Bombay—Right to enter on land of Railway Company to lay pipes, &c.—Bombay Municipal Act* (*Bom. Act III of* 1888), Sec. 222, 266—*Railway Act IX of* 1890, *Sec.* 12—*Accommodation works*—Under-

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the Bombay Municipal Act (Bom. Act III of 1888) the Corporation of Bombay has the right, for the purpose of supplying the city with water, to enter upon land belonging to other owners to make connections between the mains and to lay the pipes forming the connections through or under such lands without the owners' permission, though not without giving them reasonable notice in writing.

Held, also, that section 12 of the Railways Act (IX of 1890) does not exclude the above right of the Corporation of Bombay to enter on land belonging to the G. I. P. Railway Company for the said purposes.

G. I. P. RAILWAY COMPANY *v.* MUNICIPAL CORPORATION OF BOMBAY ... 353

WILL—*Construction—Bequest to wife with obligation of maintaining and educating children—Interest taken under such bequest—Decree against wife—Attachment of interest under will—Civil Procedure Code (Act XIV of 1882), Sec. 274—Fraudulent conveyance—Transfer of Property Act (IV of 1882), Sec. 53.*] Bomanji Darasha Captain died in 1891, leaving a widow Dhunbaiji (defendant No. 1) and two sons, Perozsha and Darasha (defendants Nos. 4 and 5). By his will he bequeathed the residue of his property to trustees (of whom Dhunbaiji was one) in trust to pay the rents and income thereof to his wife Dhunbaiji for life, "she thereout maintaining, educating, and bringing up" his children in a manner suitable to their degree in life. After his death the property, moveable and immoveable, was to be divided among his sons equally when Darasha should attain the age of twenty-five. He attained majority in October, 1895. At the date of suit, Darasha was eighteen years old and Perozsha was twenty-five. It was contended that Dhunbaiji was only a trustee of the rents for the benefit of her sons Perozsha and Darasha.

Held, that under the will Dhunbaiji took a life-interest in the rents subject to the obligation of maintaining, educating and bringing up the children. The only two surviving children (Perozsha and Darasha), having attained majority and having received property under the will of an uncle, were now no longer in need of being maintained by Dhunbaiji. The obligation imposed upon her, therefore, by her husband's will was discharged, and she was now entitled to a life-interest free from all further obligation to maintain his children.

On the 13th June, 1895, the plaintiffs obtained a decree for Rs. 3,976-10-10 against Dhunbaiji and her son Perozsha. In execution of that decree they attached under an order dated 2nd July, 1895, the immoveable properties which had belonged to the testator's estate on the ground that both Dhunbaiji and Perozsha had an interest in them. The attachment was issued under section 274 of the Civil Procedure Code (Act XIV of 1882). The defendants contended that Dhunbaiji had no attachable interest at all in the said properties, she being under the will merely a trustee as above-mentioned for her sons, and that, if she had, it was an interest in moveable property, which should have been attached under section 268 of the Code, and that the attachment under section 274 was ineffectual and inoperative. They further alleged that by an assignment dated the 20th February, 1896, Dhunbaiji had assigned and surrendered her life-interest to her son Darasha, and that such interest was, therefore, not available to satisfy the plaintiff's decree against her. As to Perozsha's interest, the defendants alleged that by a deed of settlement dated the 9th February, 1895, it was validly settled for the benefit of himself and his family and that, therefore, he had no interest in him which could be attached under the order of the 2nd July, 1895.

Held, (1) that Dhunbaiji had an attachable interest in the property.

(2) That her interest was an interest in immoveable property and was validly attached under section 274 of the Civil Procedure Code.

(3) That her assignment of the 20th February, 1896, was invalid as against the plaintiffs under section 276 of the Civil Procedure Code.

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(4) That even independently of the attachment, her assignment to her own son Darasha was invalid as against the plaintiffs under section 53 of the Transfer of Property Act (IV of 1882). The object of that assignment was to protect the property from the creditors, and it was designed to defeat the plaintiffs' decree, and it was, therefore, fraudulent and void as against the plaintiffs.

(5) That the deed of settlement by Perozsha of the 9th February, 1895, was void as against the plaintiffs under section 53 of the Transfer of Property Act (IV of 1882).

(6) That the plaintiffs were entitled to realize the shares and interest both of Dhunbaiji and of Perozsha so far as might be necessary to satisfy their decree of 13th June, 1895.

NATHA KERRA *v.* DHUNBAIJI 1

WILL—*Construction—Gift conditional on adoption—Condition precedent—Direction to adopt given to the widow of the testator's deceased son not carried out—Bequest of residuary property—Condition precedent not fulfilled—Hindu law.*

See HINDU LAW 271

——*Hindu Law—Dharam—Bequest for "dharam"—Reversioner—Limitation—Limitation Act (XV of 1877), Sec.* 10, 28; *Arts.* 120, 141, 144.] A bequest by a Hindu testator of moveable and immoveable property to trustees for *dharam* was held void. The objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control.

Morice v. The Bishop of Durham (1) referred to and followed.

The testator died in 1869, leaving two widows to whom he made specific bequests "for enjoying" "the rent and for making *dharam dan*." He bequeathed the residue of his property, moveable and immoveable, to trustees for *dharam*. One of the widows died in 1871, and the other in 1888. On the death of the survivor this suit was brought in 1888 to have the bequest set aside and for administration of the estate.

Held, on the question of limitation, that the suit was not barred. The limitation, if applicable to the moveables, would have been under Article 120, and to the immoveables under Article 141 of Act XV of 1877. Article 141, which makes the period of limitation commence from the date when the possession of the defendant becomes adverse to the plaintiff, does not apply where the suit is otherwise specially provided for, and, therefore, had no application here. At the same time, section 28 of the Act, as to the extinction of a right by the effect of limitation running against the widows, if it had done so, would not have been applicable to the plaintiff, whose right was not derived from or through the widows, but was derived through their husband on the death of the surviving widow.

RANCHORDAS *v.* PARVATIBAI... 725

WILL—*Pársis—Construction—Bequest of power of management to widow and daughter for life—Life estate—Gift to two persons as joint tenants or tenants in common—Intestacy—Non-claim by persons entitled to shares—Limitation.*] Jehangirji Nusserwanji Wadia, a Pársi, died in 1843 leaving a widow (Manekbai) and a daughter (Motlibai) and two grandsons (sons of Motlibai) him surviving. By his will (written in the Gujaráti language) he directed that during her life his widow and daughter were "to agree together and to manage the affairs with unanimity" and after Manekbai's death he gave the whole power over his estate to his daughter Motlibai "and so long as Motlibai enjoys her natural life, everything is to remain with her." The will then continued: "After the death of Motlibai—Motlibai has two sons, namely, Bhai Navroji and Bhai Nusserwanji—these two boys are the owners of whatever property and estate there may be belonging to me. They are considered as my children. No one is to offer them any hindrance or [illegible] I have presented all to my wife and to my daughter, Motlibai."

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Held, (confirming Fulton, J.) that Manekbai and Motlibai took only a life interest in the estate.

(2) (Varying the decree of Fulton, J.) that Motlibai's two sons took the estate as joint tenants subject to the life interests of Manekbai and Motlibai and not as tenants in common.

One Manockji Navroji Wadia died intestate in 1837 leaving a widow (Motlibai) and two sons, *viz.*, Nusserwanji and Navroji. Motlibai obtained letters of administration and until her death in 1897 remained in sole possession and enjoyment of her husband's estate, although by law entitled only to a widow's share, the two sons being entitled to the remainder. In this suit filed in 1897 by the widow of Nusserwanji, one of the sons,

Held, that the right of both sons to recover the shares to which they were originally entitled was barred by limitation (article 123 of the Limitation Act XV of 1877) and their right to such shares was extinguished under section 28 of the Limitation Act. Manockji's estate had, therefore, become merged in Motlibai's estate.

NAVROJI MANOCKJI WADIA *v.* PEROZBAI 80